86-144

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE L. CARSON,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I. Which circuit, the United States Court of Appeals for the Fifth Circuit, *United States v. Melendez-Gonzalez,* 727 F2d 407 (1984), or the United States Court of Appeals for the Tenth Circuit, *United States v. Carson,* Slip op. No. 85-2217 (10th Cir June 9, 1986), see Appendix "A" attached, has promulgated the correct principal of law concerning the admissibility of evidence discovered and viewed as the direct result of a prior illegal search, but not physically seized until a subsequent consensual search of the same evidence and property?

II. Can evidence discovered and observed as a direct result of a prior illegal search be purged of its "taint" and/or inadmissibility by a subsequent consent to search and physical seizure of the evidence previously viewed?

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISION INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 6
CONCLUSION 15
APPENDIX A A1
APPENDIX B A38
APPENDIX C A48
APPENDIX D A64

TABLE OF AUTHORITIES

Cases

Fraternal Order of Eagles No. 778 v. United States, 57 F2d 93 (3rd Cir 1932) 11
McGinnis v. United States, 227 F2d 598, 1st Cir 1955 12
United States v. Bailey, 628 F2d 938 (6th Cir 1980) 13
United States v. Carson, 672 F2d 831 (1985) 4, 6
United States v. Fike, 449 F2d 191 (5th Cir. 1971) 4, 6, 8
United States v. Melendez-Gonzalez, 727 F2d 407 (5th Cir 1984) 7, 8, 9
Wong Sun v. United States, 371 US 471, 83 S Ct 407 (1963) 12, 13

Rule

U.S. Sup. Ct. Rule 17.1(a), 28 U.S.C.A. 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

George L. Carson, the petitioner herein, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on June 9, 1986.

OPINIONS BELOW

The June 9, 1986, opinion of the United States Court of Appeals for the Tenth Circuit, sought to be reviewed (*Carson II*), is reported as Slip op., No. 85-2217 (10th Cir., June 9, 1986) and is reprinted in separate Appendix "A" to this Petition. The prior opinion (*Carson I*, May 13, 1985) of the United States Court of Appeals for the Tenth

Circuit is reported at 762 F2d 833 (1985), and is reprinted in separate Appendix "B" to this Petition. The August 1, 1985 opinion of the United States District Court for the District of Kansas, issued after remand by the United States Court of Appeals for the Tenth Circuit is reprinted in separate Appendix "C" to this Petition. The following judgments of the United States District Court for the District of Kansas are reprinted in separate Appendix "D" to this Petition:

a) Judgment and Probation/Commitment Order, dated July 13, 1983, of The Honorable John B. Wooley. United States Magistrate, at p. A65;

b) Memorandum Order of The Honorable Patrick F. Kelly, Judge, United States District Court for the District of Kansas, dated November 10, 1983, at p. A67;

c) Memorandum Order Nunc Pro Tunc of The Honorable Patrick F. Kelly, Judge, United States District Court for the District of Kansas, dated November 23, 1983, at p. A68.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered June 9, 1986. The jurisdiction of this court is invoked under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner, George L. Carson, was hunting doves September 17, 1982, when deputy Joe Branick of the Russell County Sheriff's Department approached and commenced a conversation. Petitioner, sitting on his five gallon pail, continued to shoot doves, killing nine in the presence of Branick. When Carson went to retrieve a dove Branick (unobserved and unknown by petitioner) searched petitioner's pail and discovered underneath a vest the challenged evidence.

After making this discovery, Branick left to inquire of Doug Sonntag, State Game Protector, employed by the Kansas Fish and Game Commission, as to the legality of petitioner's bag possession.

Branick and Sonntag returned. Sonntag asked Carson for permission to search his five gallon pail, which search revealed twelve freshly killed doves and eleven dressed doves.

Criminal charges were filed by the United States of America against petitioner for the alleged violation of 16 U.S.C. 703, 50 C.F.R. 20.35 and 50 C.F.R. 20.72. Petitioner's trial commenced March 8, 1983, before Magistrate John B. Wooley, but was continued so defendant could file

and brief his motion to suppress, which motion the Magistrate summarily denied May 12, 1983.

Prior to resumption of the trial, May 23, 1983, a stipulation was perfected between the parties that petitioner had a continuing objection to the admissibility of all testimony and evidence as being the result of an illegal search. The Magistrate accepted this stipulation. Thereafter, trial proceeded and petitioner was found guilty.

On July 12, 1983, petitioner was sentenced to 120 days imprisonment, fined $300.00, and placed on probation for two (2) years on condition that he serve 30 days confinement, thereafter abide by the usual terms of probation, with all hunting privileges suspended during the probationary period. Sentence was stayed until petitioner's appeal became final.

From the Magistrate's ruling, petitioner appealed to the United States District Court for the District of Kansas, and on November 10, 1983, the District Court held the search illegal, suppressed the evidence and set aside the conviction. The Government appealed.

The United States Court of Appeals, Tenth Circuit, predicated its first *Carson* opinion, *United States v. Carson,* 672 F2d 831, 836 (1985) on *United States v. Fike,* 449 F2d 191, 192-193 (5th Cir. 1971), but misconstrued *Fike* as "an almost identical situation", *United States v. Carson,* 762 F2d at 836, misinterpreted its holding to purge the taint from evidence observed as a direct result of the prior illegal search[1] and remanded *Carson I* to the district court to

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1. In *Fike,* supra, the challenged evidence was not viewed as a direct result of the first illegal search, but was new and independent evidence first observed and seized subsequent to the consensual search.

determine whether petitioner's consent to the second search was voluntary.

On remand, the District Court found, inter alia, the following:

1) "The United States failed to prove by a preponderance of the evidence that Mr. Branick and Mr. Sonntag (law enforcement officers) would have requested consent to search the hunting pail absent the illegal search and that they would not have inevitably discovered the 23 doves. (ROA, Vol. 1, p. 147);

2) That the inevitable discovery doctrine does not apply to the facts of this case. (ROA, Vol. 1, p. 147);

3) That the facts of this case are governed by *Melendez-Gonzalez*, 727 F2d 407 (5th Cir. 1984). (ROA, Vol. 1, pp. 147-148);

4) That the challenged evidence derived directly from the first illegal search. (ROA, Vol. 1, p. 148);

5) Carson's consent was not independent of the illegality because the officers would not have requested consent but for the first illegal search. (ROA, Vol. 1, p. 148).

but found petitioner's consent voluntary and affirmed (with reservation)[2] his conviction August 1, 1985, in compliance with the Tenth Circuit's mandate.

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2. ". . . When, however, as the court has found in this case, the government's request for a consent to search is motivated by critical information ascertained by the prior illegal conduct of the government, this Court questions how the individual's voluntary consent alone can realign the government's actions within the bounds of the Fourth and Fourteenth Amendments. Most importantly, the court questions a rule of law which allows

(Continued on following page)

Petitioner perfected a second appeal (*Carson II*) to the United States Court of Appeals for the Tenth Circuit, which on June 9, 1986, affirmed *United States v. Carson*, 762 F2d 833 (1985).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve the conflict which has arisen between the United States Court of Appeals for the Fifth and Tenth Circuits concerning the admissibility of evidence discovered and observed as a direct result of a prior illegal search, but not physically seized until a subsequent consensual search of the same evidence.

In its first *Carson* opinion, *United States v. Carson*, 762 F2d 831 (1985), the Tenth Circuit interpreted *United States v. Fike*, 449 F2d 191 (5th Cir 1971) to be "an almost identical situation" and to hold that defendant's voluntary consent to a second search was an independent act "sufficient to break the causal connection between the alleged primary illegality and the evidence found as the result of the second search", *United States v. Carson*, 762 F2d at

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Footnote continued—

the government to make a surreptitous entry into the home of a citizen, conduct an illegal wiretap or perform any illegal conduct invasive of a citizen's privacy, and then, on the basis of the information gleaned from this illegal conduct, cajole the consent of the unwitting citizen, and then find the incriminating evidence discovered is admissible evidence in a criminal prosecution of that citizen. This court believes that such law would fly directly in the face of the Fourth Amendment. Indeed, the Fourth Amendment protects private citizens against this very kind of governmental interference.

. . . In spite of the severe and fundamental problems this Court has with the application of such a rule to the facts of the case at bar, this Court is not in a position to reverse the Tenth Circuit Court of Appeals and must proceed with the disposition of this case in accordance with the Circuit Court's remand." See Appendix "C", pp. A62-A63.

836, and accordingly held that Carson's consent purged the second search of any taint from the first illegal search for Fourth Amendment purposes.

The Tenth Circuit's initial interpretation and reliance on *Fike*, supra, was erroneous (*Carson I*). Its reaffirmance in *Carson II*, *United States v. Carson*, Appendix A, pp. A1-A37), that *Fike*, supra, more clearly and accurately stated the law applicable to the *Carson* issue and its rejection of *United States v. Melendez-Gonzalez*, 727 F2d 407 (5th Cir 1984), is erroneous, also, for these reasons:[3]

(A) The Tenth Circuit inadvertently failed to note the distinguishing characteristics of *Fike*, supra, which are:

(1) The government did not attempt to introduce any evidence seized as a result of the first illegal search;

(2) The challenged evidence *was initially viewed and seized as a result of the second search*, which was valid, not viewed or "perceived" as the result of the first invalid search, *United States v. Fike*, 449 F2d at 193. (Emphasis Ours)

(3) In *Carson*, the evidence challenged was observed during the first illegal search.

(B) The *Fike* court did not hold that evidence "perceived" or viewed as a result of a prior illegal search was purged of its primary "taint" and admissible because of defendant's subsequent

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3. The Tenth Circuit did not cite or attempt to distinguish *United States v. Melendez-Gonzalez*, 727 F2d 407 (5th Cir 1984) in its first *Carson* opinion, 762 F2d 831 (1985).

> consent to search, but only that evidence discovered after defendant's voluntary consent to search is admissible.[4]

The Tenth Circuit's rejection of *United States v. Melendez-Gonzalez,* 727 F2d 407 (5th Cir 1984):

> "We reject the Fifth Circuit's analysis in *Melendez-Gonzalez* to the extent it is contrary to the Fifth Circuit's early decision, *United States v. Fike,* supra, which we believe more clearly and accurately states the applicable law. Moreover, the law in the Tenth Circuit is consistent with *United States v. Fike,* supra." (See Appendix "A", p. A24),

creates a conflict between the circuits, which conflict is not limited to the Tenth versus the Fifth, but rather the Tenth Circuit's holding and rationale is contrary to the First, Third, Fifth and Sixth Circuits, as hereinbelow specifically discussed.

The facts in *Melendez-Gonzalez,* supra, are, also, almost identical to *Carson,* supra, and *Fike,* supra, concerning the issue in conflict. In *Melendez-Gonzalez,* supra, border patrol agents observed two vehicles enter Marfa, Texas. The second vehicle, heavily loaded, and occupied by two persons was stopped and the driver asked to identify himself. Based upon that initial confrontation, the officers investigated the trunk of the car and observed a small hole. The agents looked through the hole with the aid

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4. In the first search the officers found automobile license tags and bolt cutters. The government did not introduce these at the trial and the officer testified as to the results of this search only when cross-examined by defendant's counsel. Later, that same day, a consensual search yielded the confidential vehicle identification number from the frame of the car which reflected the car was stolen. It was this evidence that was challenged, not the evidence obtained as a result of the first illegal search. *United States v. Fike,* 449 F2d 191, 192 (5th Cir 1971).

of a flashlight and saw a burlap covered object. The agents requested Melendez to open the trunk. He refused. At this point, without requesting consent, the agents sprung the trunk lid, observed a large burlap sack inside, *smelled the odor of marihuana and discontinued their exploration,* but transported Melendez and his passenger to the station where subsequent to the Miranda warning, Melendez signed a written consent form to search the car. The second search revealed twenty-one pounds of marihuana.

Defendant filed a motion to suppress, which the trial court denied because the initial stop was justified, inter alia, defendant had signed voluntarily a "consent to search" form, which consent vitiated the earlier illegal stop and search. 727 F2d at 410. The Fifth Circuit's response to this rationale was:

> *We find the district court's conclusion with regard to consent incorrect as a matter of law.* We do not dispute the fact that defendant actually signed the consent form, or even that he did so voluntarily. Further, we accept the well-established rule that 'a search conducted pursuant to consent is excepted from requirements of probable cause and warrant'. United *States v. Baldwin,* 644 F.2d 381, 383 (5th Cir. 1981). *There is no authority, however, which justifies an earlier illegal search based upon a later consent to an additional search.*
>
> . . . In the present case, *defendant's reasonable expectation of privacy* was violated on the highway when the agents sprung the trunk and first smelled marihuana. *The fact that the agents did not continue their exploration at this point does not make their actions any less a 'search'. Since for all practical pur-*

poses, the search was conducted on the highway, the consent form which defendant signed at the station simply came too late." Id. at 413-414. (Emphasis Ours).

A conflict does exists between the Fifth and Tenth Circuits concerning the legal consequences of a subsequent consensual search on evidence viewed and tainted by a prior illegal search. See *Carson II,* to-wit:

> "We agree that voluntary consent to search given after an illegal search, does not transform the prior illegal search into a legal one. We disagree with the Fifth Circuit, however, to the extent *Melendez-Gonzalez* holds that evidence is not purged of the taint of prior illegal police activity when a subsequent search, to which the defendant voluntarily consents, yields that evidence." (See Appendix "A", p. A23, Slip op. No. 85-2217, 10th Cir, June 9, 1986.)

The Tenth Circuit's holding that evidence *perceived/viewed* during an unconstitutional search, but not physically seized, may be purged of its initial "taint" by a subsequent consensual search, is semantical rationale,[5] constitutionally erroneous, and in conflict with the First, Third, Fifth and Sixth Circuits of the United States Court

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5. "We intend to distinguish between evidence illegally *perceived* and illegally *seized.* If police officers seize evidence pursuant to an illegal search then it is inadmissible under our rule, regardless of defendant's subsequent consent to search; the evidence having been obtained as a direct result of an unconstitutional search and seizure. If evidence is merely perceived as a result of an illegal search and police officers seize it pursuant to a subsequent consensual valid search, then it is admissible; the evidence having been obtained as a result of a constitutional search and seizure independent of any previous illegality." (Emphasis Ours). See Appendix "A", p. A28, Footnote 2.

of Appeals, and should be resolved by this court. See *U.S. Sup. Ct. Rule 17.1(a), 28 U.S.C.A.*

The Fifth Circuit rejected this semantical rationale, to-wit:

> ". . . There is no authority, however, which justifies an earlier illegal search based upon a later consent to an additional search."
>
> ". . . In the present case, defendant's reasonable expectation of privacy was violated on the highway when the agents sprung the trunk and first smelled marihuana. *The fact that the agents did not continue their exploration at this point does not make their actions any less a 'search'.* Since for all practical purposes, the search was conducted on the highway, the consent form which defendant signed at the station simply came too late." (*United States v. Melendez-Gonzalez,* 727 F2d at 414). (Emphasis Ours).

The Third Circuit rejected this rationale in *Fraternal Order of Eagles No. 778 v. United States,* 57 F2d 93, 94 (3rd Cir. 1932), where federal agents gained admission by misrepresentation, saw information necessary to obtain a search warrant, thereafter left the premises, obtained a search warrant based on the evidence observed by their unlawful entry, and seized the challenged evidence. The evidence was suppressed:

> ". . . The object of the entry was to discover as much as possible and use what they could see as the basis of an application for a search warrant. *When the agents first entered they searched with their eyes, saw the very thing that they were looking for.* This they had no right to see, and when illegally seen they had no right to use it as the probable cause to

secure a search warrant. The government may not make an entry by means of false representations, search as fully as possible without arousing suspicion, and later make the fruit of that entry and search the basis of what otherwise might be a legal search and seizure. When it appropriates the benefits, it must bear the burdens, of its own illegal acts. *The grafting of the original entry and illegal search upon the later search and seizure did not cure what was unlawful in the first entry and search, but, on the contrary made the whole unlawful.* . . . If the procedure of the agents in this case may be practiced by government officials, then no home in the land is safe, and the Fourth Amendment fails to accomplish its primary object in establishing the 'right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures'. Such practice would enable zealous government officials to do indirectly and by subterfuge what they may not do directly. It follows that the evidence so secured should have been suppressed." Id. at 94.

The Tenth Circuit's rationale and holding in *Carson II* was rejected in *Wong Sun v. United States*, 371 US 471, 485-486, 83 S Ct 407, 416 (1963), to-wit:

". . . Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional principles. *McGinnis v. United States*, 1st Cir, 227 F2d 598 . . ."

For specific repudiation of this semantic distinction between "perceived" and "seized" evidence to rationalize Fourth Amendment transgressions, see *McGinnis v. United States*, 227 F2d 598, 1st Cir 1955 (cited approvingly in

Wong Sun v. United States, supra), in which the First Circuit suppressed all testimony regarding all observations made during the illegal search, to-wit:

> "This statement sets forth one consequence of an illegal search, namely, that any seizure made during an illegal search would itself be illegal, and therefore, if timely and appropriate objection were made, such items could not properly remain in evidence. But this is not the full measure of the constitutional protection. *We find no basis in the cases or in logic for distinguishing between introduction into evidence of physical objects illegally taken and the introduction of testimony concerning objects illegally observed. We are aware of no case which makes this distinction.* Moreover, it seems to us that the protection afforded by the Constitution against unreasonable search and seizure would be narrowed down to a virtual nullity by any such view of the law, which in effect would grant to the victims of an unreasonable search and seizure the rather unsubstantial right to be convicted on the basis of evidence which was illegally observed rather than evidence which was illegally taken. Such is the plight of the defendants in this very case." *McGinnis v. United States,* 227 F2d at 603. (Emphasis Ours).

The Sixth Circuit in *United States v. Bailey,* 628 F2d 938 (6th Cir 1980), was direct, also, in its repudiation of the semantical rationale conceived by the Tenth Circuit to narrow and/or circumvent Fourth Amendment protection of one's privacy, to-wit:

> "We consider it irrelevant whether a particular governmental intrusion is classified as a 'search' or as

> a 'seizure'. What matters is whether it violates an individual's legitimate expectation of privacy. Therefore, it is not necessary to speculate whether a beeper 'searches' or 'seizes' anything. Furthermore, the fourth amendment does not overlook de minimis intrusions. An intrusion is not de minimis if it violates an individual's legitimate expectation of privacy. The Government's argument that beeper surveillance is too minor an intrusion to constitute a search begs the question: the intrusion is minor only if it does not violate protected individual privacy." Id. at 940.

The Tenth Circuit conceded the first search was illegal. This court should determine whether or not a law enforcement official now may benefit from his illegal act by the creation of a new exception to the Fourth Amendment of the United States Constitution as promulgated by the Tenth Circuit Court of Appeals, i.e., "perceived" versus "seized" evidence, which conflicts with the First, Third, Fifth and Sixth Circuits, or whether this court needs to reaffirm what was stated long ago:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States,* 116 U.S. 616, 635, S Ct 524, 535, 29 L Ed 746; *Silverman v. United States,* 365 U.S. 505, 513, 81 S Ct 679, 683 (1966).

CONCLUSION

WHEREFORE, for all the above reasons, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

OPINION FILED JUNE 9, 1986

NO. 85-2217

UNITED STATES v. GEORGE L. CARSON

CARSON II

(Filed June 9, 1986)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 85-2217
GEORGE L. CARSON, Defendant-Appellant.	)	

Appeal From the United States District Court
for the District of Kansas
83-10049-01

Benjamin L. Burgess, Jr., United States Attorney (Robin D. Fowler, Assistant United States Attorney, with him on the brief), Wichita, Kansas, Attorneys for Plaintiff-Appellee.

Michael S. Holland, Russell, Kansas, Attorneys for Defendant-Appellant.

Before BARRETT, LOGAN, and BALDOCK, Circuit Judges.

BARRETT, Circuit Judge.

Defendant-appellant, George L. Carson, was charged by information with the unlawful possession of doves contrary to the migratory bird treaties among the United States, Great Britain, and the United Mexican States in

violation of 16 U.S.C. § 703 and 50 C.F.R. §§ 20.35 and 20.72. Carson was found guilty and sentenced by a United States Magistrate on March 8, 1983. Carson appealed the magistrate's decision to the District Court for the District of Kansas, and on November 10, 1983, the district court reversed the magistrate and dismissed the action finding that the evidence introduced against Carson was the product of an illegal search.

The Government appealed to this court from the district court's order pursuant to 18 U.S.C. § 3731. Relying on the opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. Fike,* 449 F.2d 191 (5th Cir. 1971), we held that Carson's consent to a police search of his vehicle purged the taint of an illegal prior search. *United States v. Carson,* 762 F.2d 833, 836 (10th Cir. 1985) (*Carson I*). In *Carson I* we remanded the case to the district court to determine whether Carson's consent to the subsequent search was voluntary.

On remand, the district court found, among other things, that Carson's consent to the search was voluntary. (R., Vol. I, p. 148). Consequently, the district court reinstated Carson's original conviction. Carson now appeals from the district court's order on the ground that this court was clearly erroneous in *Carson I* in relying on *United States v. Fike, supra,* and in failing to recognize, consider or apply the holding of *United States v. Melendez-Gonzalez,* 727 F.2d 407 (5th Cir. 1984), or the constitutional principles applicable to evidence seized as a direct result of a prior illegal search.

I.

The facts before us in this appeal are the same as those in *Carson I.* For the sake of clarity, however, we

set out our statement of facts from *Carson I*, 762 F.2d at 834-35, below:

> On September 1, 1982, the defendant was hunting doves in Russell County, Kansas. Joe Branick, a Russell County deputy sheriff approached him and observed him shooting nine doves. Tr. Vol. II, p. 4-5. While defendant was hunting, Branick looked into a five gallon pail and observed under a vest at least six dressed doves. Id. at 6. Branick also observed the remains of doves scattered on the tops of tall weeds in the field where defendant was hunting. Id. at 7. Branick concluded that these remains were fresh based on the way they clung to the weeds and the color of the blood. Id. Branick then got in touch with Doug Sonntag, a State Game Protector employed by the Kansas Fish and Game Commission concerning the legality of defendant's bag possession. Branick and Sonntag returned to the area where defendant was hunting and asked him for permission to search his pickup. Defendant consented, unlocked the vehicle, took out the pail, and sat in front of Sonntag, who picked up 12 freshly killed doves, lifted up a vest and removed 11 dressed doves. Id. at 11. Sonntag testified that it was his opinion that the dressed doves had been killed earlier that day because they were still warm, of a light pinkish color and their blood was wet and sticky. Tr. Vol. III, p. 11. A second State Game Protector, Madora, handled the doves later that evening and concurred with Sonntag that the dressed doves had been killed that day. Id. at 25, 27-28.
>
> At trial before the magistrate and during cross-examination, Branick admitted that he lifted up the

vest in order to observe the dressed doves. Tr. Vol. II, p. 22. Defendant objected to the evidence from this search later during testimony from Sonntag. Id. at 45. The trial was continued to allow the defendant to file and brief a motion to suppress. Id. at 55-57. The magistrate ruled on May 12, 1983, without a suppression hearing, that the defendant had waived his right to object to the evidence because he failed to file a pretrial motion to suppress the evidence as required by Fed. R. Crim. P. 12(b)(3). The trial resumed May 23, 1983 and the defendant was found guilty.

The defendant appealed the judgment to the district court who found that the magistrate had abused his discretion in failing to hear the reason for the defendant's failure to file the pre-trial motion to suppress and for failing to address the question of whether the search was legal. The trial court then set aside the conviction and dismissed the action because it determined that Branick's search was illegal.

In *Carson I*, we affirmed the district court's ruling that the magistrate erred in refusing to grant defendant relief from the waiver provision of Rule 12(f) of the Federal Rules of Criminal Procedure. *Id.* at 835. We also agreed with the district court that the first search six dressed doves, was in violation of the Fourth Amendment. *Id.* We noted, however, that neither the district by Branick, in which he picked up the vest to reveal the court nor the magistrate discussed the validity and effect of the subsequent consensual search. *Id.*

Before considering the validity and effect of the consensual search, we quoted the defendant's testimony regarding the second search as follows:

The officers returned to the area and encountered defendant at his pickup. Defendant testified, Tr. Vol. III, pp. 60-64:

"Q. What occurred when the two of them came to the pickup?

A. We stood around talking a little bit, and just visiting. Mr. Branick said, well George, he said, I want to tell you that I think you shot too many doves and I couldn't believe it. I thought, uh, oh, here we go again. So I asked him, I said what makes you think that? And he said because I saw some feathers and some blood and something else, he said, sticking in some weeds or something, which I never did see, quite frankly.

Q. Did he tell you at that time he had searched your bucket?

A. No, he did not.

Q. Okay, what else did he say?

A. Well, he asked again, Mr. Branick asked if he could . . . if they could look into my pickup and I said, well certainly. . . .

Q. What happened then?

A. We got back to the . . . the pickup where the vehicles were. I unlocked the truck on the driver's side. I reached across the passenger side and got the bucket and brought it out toward the rear of my pickup and set it on the ground. Mr. Sonntag then proceeded to take the freshly killed undressed doves off the top of the hunting jackets, laid them on the ground. Then he lifted out two hunting jackets, then lifted off the plastic bag. . . .

Q. Now, in regard to the doves, how many dressed doves were there?

A. There were 12."

Carson I, 762 F.2d at 835-36. In light of this testimony, we held in *Carson I* that Carson's consent to the second search purged the evidence obtained thereby of any taint from the unlawful first search. We supported our holding relying exclusively on the Fifth Circuit's decision in *United States v. Fike, supra. Carson I*, 762 F.2d at 836. Recognizing, however, that the admissibility of the evidence obtained through the second search depended upon whether Carson's consent was voluntary under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), a finding not made by either the magistrate or the district court, we remanded the issue to the district court as follows:

> The argument [by the Government] is that the defendant's consent to the second search was brought to the attention of the trial court but not considered by it. Because the validity of the second search involves a question of fact, the voluntary consent to the second search, the district court, on remand, may wish to remand the case to the magistrate for determination of the facts.

Id. at 837.

On remand the district court found that Carson's consent to the second search was voluntary:

> This Court, having reviewed the transcript and record of trial proceedings before the Magistrate . . . finds that under the totality of the circumstances, Mr. Carson's consent was the product of his own free will and unconstrained choice. The Court finds that Mr. Carson's consent to the search was voluntary.

(R., Vol. I, p. 137.) Based on this factual determination the district court reinstated and affirmed Carson's conviction by the magistrate. (R., Vol. I, p. 148.)

In the instant appeal, Carson challenges his conviction contending that this court clearly erred in *Carson I* in holding that "defendant's consent purged the second search of any taint from the first search." *Carson I*, 762 F.2d at 836. First, Carson contends we clearly erred in *Carson I* in relying on *United States v. Fike, supra,* in light of the Fifth Circuit's subsequent decision in *United States v. Melendez-Gonzalez, supra,* and constitutional principles articulated by the Supreme Court. Second, Carson contends that even if the subsequent consensual search purges the taint of the prior illegal search, the evidence should be excluded because it was obtained as a direct result of the initial illegal search.

II.

Before considering the merits of this appeal, two procedural issues raised by the parties should be addressed. First, Carson contends that the Fifth Circuit's decision in *United States v. Melendez-Gonzalez, supra,* sets forth the appropriate rule of law applicable to *Carson I* and effectively overrules the Fifth Circuit's decision in *United States v. Fike, supra,* relied upon by this court in *Carson I*. "*United States v. Melendez-Gonzalez,* 727 F.2d 407 (5th Cir. 1984), not cited by this court in its intial *Carson* opinion, fully discusses the doctrine of 'consent to search,' its legal consequences and specifically rejected this court's holding that evidence derived from the first illegal search is admissible based upon a subsequent consent to search. *Id.* at 413-14." (*Appellant's Brief,* p. 11.) It is well settled that the decisions of one circuit court of appeals are not

binding upon another circuit. *Newsweek, Inc. v. United States Postal Service,* 663 F.2d 1186, 1196 (2d Cir. 1981), *affirmed,* 462 U.S. 810 (1983). While we often rely upon the analysis and decisions of other circuit courts of appeals, as we did in *Carson I,* we are not bound by their decisions or modifications of those decisions. As such, we are not bound by any modifications of *United States v. Fike, supra,* by subsequent Fifth Circuit decisions. We do not believe that *United States v. Melendez-Gonzalez, supra,* sets forth the correct rule of law nor are we in any way bound by it.

Second, the Government argues that *Carson I* is law of the case which limits our review in the instant appeal to the district court's factual finding that Carson's consent was voluntary. We recognize that law of the case is not a jurisdictional rule; rather it is a rule to be applied at the sound discretion of the court to effectuate the proper administration of justice:

> "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson,* 225 U.S. 436 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152. The practice is not rigidly binding, but generally an appellate court will not depart from a rule of law established on an earlier appeal in deciding the same issues, except for cogent reasons.

Bromley v. Crisp, 561 F.2d 1351, 1363 (10th Cir. 1977), *cert. denied,* 435 U.S. 908 (1978). Considering Carson's arguments and the district court's observations regarding

our holding in *Carson I*, we believe the administration of justice in this circuit will be furthered by our review and application of the *Carson I* rule here. We therefore decline to limit our review to the district court's finding that Carson's consent was voluntary.

III.

A.

The precise legal issue which Carson raises in the case at bar is whether voluntary consent to a search necessarily means that the evidence is obtained free of police exploitation of the fruits of prior unlawful conduct or is obtained in a manner sufficiently distinguishable from the prior illegality to purge the evidence of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). We reaffirm our rule in *Carson I*. We hold that *voluntary* consent, as defined for Fourth Amendment purposes, is an intervening act free of police exploitation of the primary illegality and is sufficiently distinguishable from the primary illegality to purge the evidence of the primary taint.

Our holding is supported by the United States Supreme Court's opinion in *Wong Sun v. United States, supra*. In *Wong Sun, supra*, at 487, the Supreme Court considered whether evidence seized as a result of prior, illegally obtained statements should be excluded as "fruits of the poisonous tree." The Court noted that under the facts of *Wong Sun*, neither one of the two established exceptions to the "fruit of the poisonous tree" doctrine, the independent source rule, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), nor the attenuation doctrine, *Nardone v. United States*, 308 U.S. 338, 341 (1939), applied to cure the taint of the primary illegality. None-

theless, the Court held that even though evidence would not have come to light *but for* prior illegal police conduct, such evidence is not inadmissible *per se*:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).

Wong Sun, 371 U.S. at 487-88. The rule of *Wong Sun* is quite clear: evidence should not be excluded as a "fruit of the poisonous tree" simply because it comes to light as a result of prior illegal police activity; rather evidence, the knowledge of which is obtained as a result of prior police illegality, is admissible so long as (1) it has not been subsequently obtained through exploitation of that illegality, or (2) it has been subsequently obtained by means sufficiently distinguishable from the prior illegality to purge the evidence of the taint. *Accord, Segura v. United States*, 468 U.S. 796 (1984).

Before proceeding further, however, we believe it will be useful for purposes of this opinion to discuss the implications of this pivotal language from *Wong Sun*. We note that in the first sentence of the above-quoted language of *Wong Sun*, the Supreme Court rejected a "but for" exclusionary rule for evidence which comes to light as a result of illegal actions of the police. *See, e.g., Dunaway v. New York*, 442 U.S. 200, 217 (1978); *Brown v. Illinois*, 422 U.S. 590, 603 (1974). *See also, United States*

v. Fallon, 457 F.2d 15, 20 (10th Cir. 1972) ("the [evidence] would not have been obtained had the defendant not been stopped and detained. However, we do not read the *Wong Sun* case as holding that a "but for" factual connection is legally sufficient [to render the evidence inadmissible]"). As the Supreme Court makes quite clear, for purposes of the "fruit of the poisonous tree" doctrine, the issue of whether evidence is admissible is not resolved by determining that the actions of the police in obtaining evidence were completely lawful. The issue is resolved by determining whether the evidence is obtained either free of exploitation of police illegality or by means sufficiently distinguishable to purge the taint of the illegality

Unfortunately, the Supreme Court has not defined the terms "exploitation" or "sufficiently distinguishable" used in *Wong Sun.* For purposes of this opinion, it is important to define what we believe the Supreme Court intended when it adopted and employed these terms. In the context of voluntary consent, we hold that "exploitation of the primary illegality" means that the police use the fruits of the primary illegality to coerce defendant into *granting* his consent.

Evidence obtained pursuant to consent "has been come at" by defendant's *grant* of consent, not by the police request, regardless of how reasonable the request might be. The exploitation issue focuses solely on defendant's *grant* of consent, not on the bare request, or the reasons underlying it. While the police may exert coercion in the *manner* in which they *request* defendant's consent, the request itself, even if motivated by the fruits of the prior illegality, is not exploitation. As the Supreme Court recently stated in *Moran v. Burbine,* 54 U.S.L.W. 4265, 4267 (U.S. March 11, 1986): "[T]he state of mind of the po-

lice is irrelevant to the question of the intelligence and voluntariness of [defendant's] election to abandon his rights."

Under the Fourth Amendment, evidence obtained pursuant to defendant's consent is admissible only if defendant's grant of consent is voluntary under the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 248-49 (1973). Therefore, in a case in which evidence is obtained pursuant to consent granted subsequent to illegal police actions, the "exploitation" issue under *Wong Sun* is resolved simply by determining whether or not defendant's *grant* of consent was voluntary under the totality of the circumstances. The police officers' reason or basis for asking for defendant's consent is irrelevant to the "exploitation" issue unless the manner in which the police officers request consent renders defendant's consent involuntary. When defendant's grant of consent is voluntary, then there is no exploitation; as we will discuss *infra,* the findings of voluntary consent and "exploitation" are mutually exclusive.

We also hold that in the context of voluntary consent, the "sufficiently distinguishable" standard in *Wong Sun* refers to means of obtaining evidence substantially independent of the prior illegality. This standard contemplates an exception different than the "independent source rule" or the "attenuation doctrine" expressly found not to apply in *Wong Sun.* The "independent source rule" states that while knowledge of facts illegally acquired may not be used at all against defendant, the knowledge of these facts may be used against defendant if it is gained from an independent source. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920). We do not believe the independent source rule applies when the police request

consent to search based on the knowledge of facts illegally acquired. Yet, in *Wong Sun,* the Court held that even though the independent source rule or the attenuation doctrine did not apply, evidence obtained is not necessarily inadmissible merely because it comes to light as a result of illegal police actions. The "sufficiently distinguishable" inquiry, then, does not turn on whether the evidence is obtained by an independent source; rather, the inquiry turns on whether the evidence is obtained by means, although influenced by prior illegal police actions, which are different enough from the prior illegality to be "sufficiently distinguishable." Because it is the grant of consent not the request for consent which validates evidence seized thereby, we hold consent to search, if voluntary, is a sufficiently distinguishable means of obtaining evidence from other prior illegal police actions to purge the evidence of the primary taint.

We believe our definitions of the standards articulated in *Wong Sun* are necessary to effectuate the Supreme Court's analysis. The Supreme Court's rejection of a "but for" exclusionary rule and the Court's adoption of the *Wong Sun* standards would be meaningless were we to hold that evidence obtained pursuant to consent is inadmissible when a police *request* to search is predicated upon prior illegal police actions. We would be hard pressed to find any fact situation in which evidence obtained pursuant to voluntary consent could ever be purged of the taint of the prior illegality. Because the authority to search in a consent case arises out of defendant's grant of consent, under *Wong Sun,* the "exploitation" standard must focus on the voluntariness of defendant's consent, not the police officers' reasons for requesting consent. Likewise, the "sufficiently distinguishable" standard focuses on the method by which evidence is obtained. In

a consent case, because the method of obtaining evidence is the defendant's grant of consent, the "sufficiently distinguishable" standard focuses on the grant of consent and not on the police officers' reasons for attempting to use that method of obtaining evidence.

B.

We next decide what standard of "voluntariness" satisfies either one of the two *Wong Sun* standards. We hold that the tests articulated by the Supreme Court and this court to determine Fourth Amendment "voluntariness," satisfy, by definition, either *Wong Sun* standard. In *Schneckloth v. Bustamonte,* 412 U.S. 218, 248-49 (1973), the Supreme Court held that consent to a Fourth Amendment search must be voluntary *in fact* and free of coercion under the totality of the circumstances:

> We hold only that when . . . the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that [the Government] demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

This court has set out a three-tiered standard for determining whether the Government has sustained the burden of showing that consent to search was in fact voluntary under *Schneckloth v. Bustamonte, supra*:

> (1) There must be clear and positive testimony that consent was "unequivocal and specific" and "freely

> and intelligently" given; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

United States v. Abbott, 546 F.2d 883, 885 (10th Cir. 1977), citing *Villano v. United States*, 310 F.2d 680, 684 (10th Cir. 1962). *See also, United States v. Gay*, 774 F.2d 368, 376 (10th Cir. 1985); *United States v. Recalde*, 761 F.2d 1448, 1453 (10th Cir. 1985). It is clear that Fourth Amendment "voluntariness" requires a showing by the Government that defendant's consent is free of police coercion and is voluntary *in fact*. By definition, then, Fourth Amendment "voluntariness" necessarily requires a finding by the district court that the evidence was obtained freely and not by police "exploitation of [the primary] illegality. . . ." *Wong Sun, supra*, at 487-88, making the two findings mutually exclusive. Moreover, under *Wong Sun*, a search conducted pursuant to voluntary consent is a sufficiently distinguishable means of obtaining evidence to purge it of the taint of the primary illegality.

While "voluntariness" for Fourth Amendment consent satisfies the *Wong Sun* standards, the tests for "voluntariness" to waive other constitutionally protected rights differ and therefore do not necessarily satisfy the *Wong Sun* standards. For example, the standard of "voluntariness" for consent to waive Fourth Amendment rights differs from the standard of "voluntariness" for consent to waive Fifth Amendment rights. A valid waiver of Fourth Amendment rights may not be presumed but may only be effected when the Government discharges its burden of proving that defendant's consent is voluntary

in fact; a valid waiver of Fifth Amendment rights may be presumed when an incriminating statement is made by defendant *after* he is given the warnings required by *Miranda v. Arizona,* 384 U.S. 486 (1966). *See Oregon v. Elstad,* 53 U.S.L.W. 4244, 4247 (U.S. March 5, 1985). Yet, while statements may be made pursuant to an otherwise valid, voluntary waiver of Fifth Amendment rights, Fifth Amendment "voluntariness" does not necessarily purge the taint of an underlying Fourth Amendment violation, such as an illegal arrest. *Brown v. Illinois,* 422 U.S. 590 (1975). The distinctions among the standards of voluntariness has led to confusion in many cases. We believe that *Brown v. Illinois, supra,* clarifies the law in this area.

In *Brown v. Illinois, supra,* the Supreme Court held that the mere giving of "*Miranda* warnings, *alone* and *per se,* cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Id.* at 603 and 605. Noting the differences between the Fourth and Fifth Amendments with respect to consent, the Court stated that *Miranda* warnings, which establish Fifth Amendment voluntariness, must be considered with other factors, such as the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct, evaluated upon the facts of each case, for the trial court to determine "whether a confession is the product of a free will under *Wong Sun*. . . ." *Id.* at 603-04.

The implication of the Supreme Court's decision in *Brown v. Illinois* is that in order for incriminating statements to be purged of the taint of an underlying Fourth

Amendment violation, defendant's consent must meet the voluntariness standard of the Fourth Amendment.

> [A]lthough a confession after proper *Miranda* warnings may be found "voluntary" for purposes of the Fifth Amendment, this type of "voluntariness" is merely a "threshold requirement" for Fourth Amendment analysis, 422 U.S. at 604. Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached.
>
> Beyond this threshold requirement, *Brown* articulated a test designed to vindicate the "distinct policies and interests of the Fourth Amendment." *Id.*, at 602. . . .

Dunaway v. New York, 422 U.S. 200, 217 (1978) (footnote omitted) citing *Brown v. Illinois, supra.*

We believe that to the extent the Government is required to show attenuation between the primary police illegality and the evidence obtained beyond the Fifth Amendment "voluntariness" standard, the Supreme Court intended in *Brown v. Illinois, supra,* that a defendant's consent to waive his Fifth Amendment rights also meet the Fourth Amendment "voluntariness" standard to satisfy either *Wong Sun* standard. The Supreme Court concluded its opinion noting that the holding in *Brown v. Illinois* is a limited one: "We decide only that the Illinois courts were in error in assuming that the *Miranda* warnings, by themselves, under *Wong Sun* always purge the taint of an illegal arrest." *Id.* at 605. Fourth Amendment voluntariness is not a "threshold requirement;" it is the sole constitutional requirement for determining whether "the taint of a prior illegality" has been purged under *Wong Sun.*

To summarize, under *Wong Sun*, illegal police actions do not *necessarily* render inadmissible all verbal or physical evidence obtained subsequent to and as a result of the illegal police conduct. Likewise it is clear under *Brown v. Illinois*, that adherence to minimal procedural requirements such as the giving of *Miranda* warnings, does not *necessarily* establish "voluntariness" sufficient to purge evidence of the taint of prior Fourth Amendment violations. *Brown v. Illinois, supra*, implies that consent must be voluntary *in fact* (the Fourth Amendment voluntariness standard) in order for defendant's consent both to act as a waiver of constitutional rights and to render evidence sufficiently independent of any previous Fourth Amendment violation to purge it of the primary taint. The factors articulated in *Brown v. Illinois* are examples of the kinds of facts which a court should consider in addition to the threshold finding of Fifth Amendment voluntariness to bring defendant's consent within Fourth Amendment voluntariness standards.

IV.

We hold that the law of this circuit, that consent which is voluntary for purposes of the Fourth Amendment satisfies either *Wong Sun* standard, is consistent with the Supreme Court's decisions interpreting *Wong Sun* and the Fifth Circuit's decision in *United States v. Fike, supra*. We reject Carson's proposed analysis to the contrary and his reliance on *United States v. Melendez-Gonzalez, supra*, as a correct statement of the law.

In *United States v. Fike, supra*, defendant left a stolen automobile with a car dealer while he test drove one of the dealer's vehicles. Defendant failed to return the vehicle within two hours and the dealer called the police

*to the car lot. There the police searched the stolen auto*mobile, removed it to the sheriff's office, and arrested defendant. While in custody, defendant consented to a second police search of the automobile. The second search yielded the vehicle identification number from the frame of the car which was admitted at trial. Automobile license tags and bolt cutters observed in the trunk as a result of the first search were not introduced at trial.

On appeal defendant challenged the legality of both searches. The court explained defendant's argument as follows: "The appellant does not contend that the consent to the second search was tainted by the first search but rather that the second search itself was tainted. Assuming consent, appellant argues, the second search would not have taken place 'but for' the first search, and, as a result, it is tainted." *United States v. Fike,* 449 F.2d at 194 (footnote omitted). The Fifth Circuit rejected defendant's "but for" analysis rendering the evidence inadmissible:

> It is possible that "but for" the first search, the police would not have taken the car, would not have taken the defendant into custody, and would not have conducted the second search which yielded the challenged evidence. However, assuming, but not deciding, that the first search was illegal, we hold that the evidence gained as a result of the second search, the only evidence of which the defendant complains, was admissible. This is so because the voluntary consent of the defendant to the second search, found by the district court and affirmed by this Court, was an independent act sufficient to break the causal connection between the alleged primary illegality and the evidence found as a result of the second search

> and admitted at trial. The consent not only, as discussed above, served to validate the second search for Fourth Amendment purposes but also purged the second search of the "primary taint."

Id. at 193. Relying on its earlier opinion in *Bretti v. Wainwright*, 439 F.2d 1042 (5th Cir.), *cert. denied*, 404 U.S. 943 (1971), the court concluded that as a matter of law voluntary consent is an independent act sufficient to break the causal connection between prior illegal activity and a subsequent search.

> In *Bretti* the search would not have taken place "but for" the arrest, yet the Court, once voluntary consent was found, determined that evidence seized as a result of the search was admissible. We feel that this reasoning applies equally well to the case at bar, where voluntary consent similarly breaks the "but for" chain and allows admissibility.
>
> Consent to search has been repeatedly recognized as sufficient to waive Fourth Amendment rights. It is also an independent act sufficient to break any causal chain which may exist between the alleged primary illegality of the first search and the evidence seized as a result of the second search and introduced at trial.

United States v. Fike, 449 F.2d at 194 (citations omitted).

United States v. Melendez-Gonzalez, supra, which Carson contends is contrary to and overrules *United States v. Fike, supra*, involved the stop of an automobile by a roving border patrol to search for illegal aliens. Law enforcement agents conducted a search of the vehicle at the time of the stop. Upon opening the trunk, the law enforcement agents smelled marijuana. No evidence was

seized at that time and the defendant was taken to the nearest police station. Defendant signed a consent to search form after the agents gave *Miranda* warnings and advised him of his right to refuse to sign the consent form.

The Fifth Circuit held that both the stop and the ensuing roadside search were illegal because the agents did not have probable cause for either. The court also held that even if the initial stop were lawful, the roadside search would nonetheless be illegal because it was neither supported by probable cause nor conducted pursuant to voluntary consent. *Id.* at 412-13. Finally the court reversed the district court's finding and conclusion that the defedant's consent to the second search at the police station "was voluntarily given, and that such consent vitiates the allegedly illegal stop." *United States v. Melendez-Gonzalez,* 727 F.2d at 413. In reversing the district court, the Fifth Circuit held, without citing *United States v. Fike, supra*:

> We do not dispute the fact that defendant actually signed the consent form or even that he did so voluntarily. Further, we accept the well-established rule that "a search conducted pursuant to consent is excepted from requirements of probable cause on a warrant." There is no authority, however, which justifies an earlier illegal search based upon the later consent to an additional search.
>
> . . . In the present case, defendants' reasonable expectation of privacy was violated on the highway when the agents sprung the trunk and first smelled marijuana. The fact that the agents did not continue their exploration at this point does not make their actions any less a "search." Since for all practical purposes,

> the search was conducted on the highway, the consent form which defendants signed at the station simply came too late.

Id. at 413-14 (citations omitted). We agree that voluntary consent to search given after an illegal search, does not transform the prior illegal search into a legal one. We disagree with the Fifth Circuit, however, to the extent *Melendez-Gonzalez* holds that *evidence* is not purged of the taint of prior illegal police activity when a subsequent search, to which the defendant voluntarily consents, yields that evidence.

Melendez-Gonzalez indicates that in the Fifth Circuit something more than Fourth Amendment "voluntariness" is needed for defendant's consent to purge the taint of prior illegal police activity. For example, in reviewing the district court's factual finding regarding defendant's consent to the roadside search, the court set forth its standard for determining whether consent purges the taint of prior illegality:

> When attempting to prove voluntary consent to search following an illegal stop, the Government has a much heavier burden to satisfy than when proving consent to search after a legitimate initial stop. *In addition to proving valid and voluntary consent to search,* the Government must also establish the existence of intervening factors which prove that the consent was sufficiently attenuated from the illegal stop. . . .

Id. at 414-15 (citations omitted and emphasis added). We do not believe that under *Wong Sun, supra,* or *Brown v. Illinois, supra,* the Government is required to show attenuation beyond a finding of voluntary, valid consent

under Fourth Amendment standards. We reject the Fifth Circuit's analysis in *Melendez-Gonzalez,* to the extent it is contrary to the Fifth Circuit's earlier decision in *United States v. Fike, supra,* which we believe more clearly and accurately states the applicable law. Moreover, the law in the Tenth Circuit is consistent with *United States v. Fike, supra.*

In *United States v. Sor-Lokken,* 557 F.2d 755 (10th Cir. 1977), defendant's ex-wife permitted law enforcement officers to enter defendant's house to examine unregistered firearms. Defendant's ex-wife did not own the house but became aware of the weapons' existence while visiting her children who were in defendant's custody and living at his home. When defendant fled his home due to the commencement of a child neglect investigation, defendant's ex-wife obtained access to the house and notified the police of the unregistered weapons. Based upon unauthorized consent to search granted by the ex-wife, the police searched the house and seized one weapon.

Later that day, the same officers returned to defendant's residence to seize the remaining weapon. This time defendant's friend, with whom defendant left a key to the house and a handwritten, notarized note permitting the friend's access to the property, consented to the officers' search of the premises. This search resulted in the seizure of the second unregistered weapon.

We held that the first search of the premises, to which defendant's ex-wife had consented, was an unlawful search. We also held, however, that the second search was valid because defendant's friend possessed sufficient authority to consent to a search of defendant's residence and did so voluntarily. Defendant argued that regardless of the authorized consent to search, the weapon seized

in the second search was inadmissible as the direct result of the prior illegal search which was the "but for" cause of the second search. Relying upon the Supreme Court's opinion in *Wong Sun,* we rejected defendant's argument:

> Even if it were demonstrated that the officers' afternoon search was a necessary prerequisite to the evening search, the carbine would still be unsusceptible to exclusion.
>
> > "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'." *Wong Sun v. United States, supra,* 371 U.S. at 487, 488, 83 S.Ct. at 417.
>
> Consent to search satisfies Fourth Amendment requirements apart from the presence or absence of probable cause to conduct a search. The consent obtained in this case purged the disputed search of any possible taint.

United States v. Sor-Lokken, 557 F.2d at 758.

More recently, we held that consent may purge the taint of a prior illegality. In *United States v. Recalde,* 761 F.2d 1448 (10th Cir. 1985) defendant challenged the admissibility of evidence obtained pursuant to his written consent to search his vehicle executed at a police station following his unlawful roadside seizure and de-

tention. We noted the effect of consent following illegal police action as follows:

> The Supreme Court has consistently held that evidence obtained after an illegal arrest or seizure must be suppressed as the fruit of the illegal detention. There is, however, no per se rule prohibiting use of such evidence, and a defendant's consent may, *under certain circumstances,* remove the taint of an illegal detention.

Id. at 1457 (citations omitted and emphasis added). The circumstances under which defendant's consent removes the taint of a prior illegal police action is when consent is voluntary under the totality of the circumstances.

In *Recalde,* we reviewed the facts to determine whether or not defendant's station-house consent was voluntary. We reversed, holding that under the facts of *Recalde,* the district court's finding of valid voluntary consent was clearly erroneous. *Id.* at 1458.

V.

We believe the facts of the case at bar illustrate precisely the reasons for the rule which we reaffirm here. We hold, as we did in *Carson I,* that the initial search by Deputy Sheriff Branick of Carson's bucket containing the dressed doves was illegal. Carson, however, was not aware of the initial illegal search. (R., Vol. I, p. 136.) When Deputy Sheriff Branick and Mr. Sonntag later returned to the scene, Carson willingly agreed to let them look into his pickup truck. The district court found that "Mr. Carson's consent was the product of his own free will and unconstrained choice. The Court finds that Mr. Carson's consent to the search was voluntary." (R., Vol. I, p. 137.)

There is no evidence in the record showing that the officers used information obtained in the prior illegal search to coerce Carson into consenting to the subsequent search.[1] Carson waived his Fourth Amendment rights by voluntarily consenting to a search, independent of the prior police activity of which he did not know. As the Supreme Court recently stated in *Moran v. Burbine*, 54 U.S.L.W. 4265, 4267 (U.S. March 11, 1986): "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." We see no reason to permit Carson to reassert those rights or to exclude evidence lawfully obtained through the consensual search.

In addition, and contrary to Carson's contention, we place no significance on the fact that the doves seized in this case were the same evidence illegally observed as a result of the prior search by Deputy Sheriff Branick. The means by which the evidence was ultimately seized was constitutional (voluntary consent) and sufficiently distinguishable from the underlying illegality. While we agree that the prior illegal search is not rendered legal by Carson's subsequent consent, so that Deputy Sheriff Branick would be precluded from testifying about his observations and knowledge obtained as a result of the illegal search, we hold the *evidence* is nonetheless purged of the

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1. If there were evidence of coercion in the manner in which the police requested Carson's consent, that evidence would affect the determination of whether defendant's consent was voluntary. If a district court were to find, after a factual determination, that consent to a search was involuntarily given, we would be left with the inescapable conclusion that the police officers exploited the original illegality and that defendant's consent was insufficiently distinguishable to purge the primary taint.

primary illegality and is admissible because it was legally obtained pursuant to voluntary consent.[2]

In the Memorandum and Order of August 1, 1985, the district court commented upon the rule set forth in *Carson I*. We believe our response to the district court's following observations will help to explain our holding.

> In the final analysis, this Court views the issue as whether a voluntary consent to search will always constitute a sufficient independent act to break the causal connection between illegal government conduct and the challenged evidence. The Tenth Circuit Court of Appeals in the instant case stated, "[D]efendant's consent purged the second search of any taint from the first search and validated the second search for Fourth Amendment purposes." Slip op. at 7, *citing United States v. Fike*. Nevertheless, the Fifth Circuit Court of Appeals, in a case decided 10 years after it decided *Fike*, held that a voluntary consent given after an illegal search did not purge the taint when the consensual search yielded the same evidence previously discovered illegally. The Fifth Circuit stated, "There is no authority, however, which justifies an earlier illegal search based upon a later consent to an additional search." *Melendez-Gonzalez, supra*, at 414. This Court believes the facts of this case are governed by the *Melendez-Gonzalez* case. Specifically, under

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2. We intend to distinguish between evidence illegally *perceived* and illegally *seized*. If police officers seize evidence pursuant to an illegal search then it is inadmissible under our rule, regardless of defendant's subsequent consent to search; the evidence having been obtained as a direct result of an unconstitutional search and seizure. If evidence is merely perceived as a result of an illegal search and police officers seize it pursuant to a subsequent consensual, valid search, then it is admissible; the evidence having been obtained as the result of a constitutional search and seizure independent of any previous illegality.

the facts of the case at bar, this Court finds that the challenged evidence derived directly from the first illegal search; Carson's consent was not independent of the illegality because the officers would not have requested consent but for the first illegal search; and defendant's consent, however voluntary, did not break the causal connection between the first illegal search and the challenged evidence discovered in the second search.

Nevertheless, this Court is hardly in a position to reverse the Tenth Circuit Court of Appeals. It is possible that when an individual's consent to a governmental search is the product of that individual's free will, the consent will always be an act so independent of the illegal governmental conduct that voluntary consent alone will vitiate the taint of the prior illegality. When, however, as the Court has found in this case, the government's request for consent to search is motivated by critical information ascertained by the prior illegal conduct of the government, this Court questions how the individual's voluntary consent alone can realign the government's actions within the bounds of the Fourth and Fourteenth Amendments. Most importantly, the Court questions a rule of law which allows the government to make a surreptitious entry into the home of a citizen, conduct an illegal wiretap or perform any other illegal conduct invasive of a citizen's privacy, and then, on the basis of the information gleaned from this illegal conduct, cajole the consent of the unwitting citizen, and then find that incriminating evidence discovered is admissible evidence in a criminal prosecution of that citizen. This Court believes that such law would fly directly in

the face of the Fourth Amendment. Indeed, the Fourth Amendment protects private citizens against this very kind of governmental interference.

Nevertheless, this Court recognizes that an individual's consent, when it is knowing and completely voluntary, may be in itself an independent act sufficiently removed or attenuated from the illegal conduct of the government to permit the use of the discovered evidence in a criminal trial against that individual. In spite of the severe and fundamental problems this Court has with the application of such a rule to the facts of the case at bar, this Court is not in a position to reverse the Tenth Circuit Court of Appeals and must proceed with the disposition of this case in accordance with the Circuit Court's remand.

Therefore, the only issue which is actually before this Court is the factual determination of whether Mr. Carson voluntarily consented to the search, and this Court finds that Mr. Carson gave his full and voluntary consent to the search.

(R., Vol. I, pp. 146-48.)

The district court correctly states that under our rule in *Carson I,* defendant's consent to a search, so long as it is voluntary *in fact,* constitutes a sufficiency independent act to purge the evidence of the taint of the prior illegal Government conduct. This is so even when defendant's voluntary consent, granted after an illegal search, yields the same evidence previously discovered illegally.

We disagree, however, with the district court's finding that "Carson's consent was not independent of the illegality because the officers would not have requested consent

but for the first illegal search. . . ." *Id.* at 147 (emphasis added). The district court's finding is directly contrary to the Supreme Court's expressed rejection in *Wong Sun, supra,* of a "but for" exclusionary rule. The issue is not whether the officers "would not have requested consent *but for* the first illegal search," but rather whether the officers exploited the fruits of their illegal activity in such a way that Carson's consent to the search was involuntary under the Fourth Amendment. *Wong Sun, supra* at 488.

We also disagree with the district court's finding and conclusion that a defendant's voluntary consent does not purge the taint of the prior illegality when the Government's request for consent to search is *motivated* by illegally obtained information. "When, however, as the Court has found in this case, the Government's request for consent to search is motivated by critical information ascertained by the prior illegal conduct of the Government, this Court questions how the individual's voluntary consent alone can realign the Government's actions within the bounds of the Fourth and Fourteenth Amendments." (R., Vol. I, p. 147.) The Government's motivation is irrelevant to the issue of whether or not the evidence is obtained by means "sufficiently distinguishable to be purged of the primary taint," or free of police exploitation of the prior illegality. *Wong Sun,* 371 U.S. at 488. In a consent case under *Wong Sun,* the only inquiry is whether the defendant's *grant* of consent is voluntary under the totality of the circumstances. The police officers' purpose, motivation, or basis for merely *requesting* the defendant to waive his Fourth Amendment rights have no bearing on the validity and effect of defendant's consent once it is determined that this consent is voluntary under the totality of the circumstances.

We also disagree with the district court's following statement:

> Most importantly, the Court questions a rule of law which allows the government to make a surreptitious entry into the home of a citizen, conduct an illegal wiretap or perform any other illegal conduct invasive of a citizen's privacy, and then, on the basis of the information gleaned from this illegal conduct, *cajole the consent of the unwitting citizen* and then find that incriminating evidence discovered is admissible evidence in a criminal prosecution of that citizen.

(R., Vol. I, p. 147 (emphasis added). If the consent of an unwitting citizen has been "cajoled" based on the illegal conduct of Government officials, then the citizen's consent is not "voluntary." If Government officials use the fruits of their illegal conduct to "cajole" the consent of an unwitting citizen, then the evidence is obtained by exploitation of the primary illegality and is not obtained by means sufficiently distinguishable from the illegality to be purged of the primary taint. We agree that there may be certain situations in which Government officials, using illegally obtained information, might coerce or cajole the defendant into consenting to a search. Under such circumstances the consent would be involuntary, the search illegal, and the evidence seized thereby rendered inadmissible.

Finally, considering the policy reasons underpinning the exclusionary rule, we hold that extending the "fruit of the poisonous tree" doctrine to exclude evidence obtained in a case in which defendant voluntarily consents to waive his constitutional rights does not justify the costs upon law enforcement. As Justice Powell stated in his concurring opinion in *Brown v. Illinois,* 422 U.S. 590, 608-09 (1975) (Powell, J., concurring in part):

> The Court's rejection in *Wong Sun* of a "but for" test, reaffirmed today . . . recognizes that in some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. The notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of the illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.

A search conducted pursuant to voluntary consent is one of the specifically established exceptions to the technical requirements of the Fourth Amendment. Excluding evidence obtained pursuant to voluntary consent neither protects Fourth Amendment rights, which are waived by the defendant's consent, nor deters law enforcement officials from conducting illegal searches and seizures which are of little, if any, value to the police in obtaining defendant's subsequent voluntary consent. The mere hope that they may later be able to obtain defendant's voluntary consent to a subsequent search is little incentive for police initially to proceed illegally. In addition, the inability of law enforcement officials to rely upon illegally obtained evidence to obtain valid search warrants or to obtain legally sufficient probable cause for searches and seizures sufficiently protects Fourth Amendment rights from deliberate police violations. In cases in which defendant's voluntary consent to search is obtained, strict adherence to the exclusionary rule would impose greater costs on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes.

AFFIRMED.

No. 85-2217, UNITED STATES v. CARSON
LOGAN, Circuit Judge, concurring:

I agree with the result in the majority decision. But parts III and IV state a broader rule than I am willing to accept.

First, I do not read *Wong Sun v. United States*, 371 U.S. 471 (1963), as setting out two tests under which evidence, the knowledge of which was obtained as a result of prior illegal police action, may be admissible. *Wong Sun* does reject a "but for" test. The rule it adopts, however, is that such evidence is admissible if "instead" of exploiting the illegality, the evidence was obtained by means "sufficiently distinguishable to be purged of the primary taint." *Id.* at 488. In other words, the majority's two independent tests are really different sides of the same coin.

Further, I do not read *Wong Sun* as holding that the circumstances surrounding the government's illegal acts are irrelevant whenever consent has been given freely. *Wong Sun* refused to permit defendant Toy's statements into evidence, although allegedly voluntarily given, because of the particular circumstance of that case. The officers had broken down his door, followed him into a bedroom, handcuffed, and arrested him; his consent in those circumstances did not purge the taint of the initial unlawful invasion. *Id.* at 486. On the other hand, defendant Wong Sun's statement was admissible because he gave it several days after his release on his own recognizance and after he had voluntarily returned to the police. In such circumstances the Court found that the taint had been dissipated.

Brown v. Illinois, 422 U.S. 590 (1975), which also involved the admissibility of a confession following an

illegal arrest, clarified the holding of *Wong Sun*. In *Brown* a confession had been obtained after a Miranda warning; the Court held it was not automatically admissible even if it was voluntary. Rather, it stated that a court must view the illegal arrest under the Fourth Amendment and determine whether the confession was obtained by exploitation of the illegal arrest. In making that determination the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant." *Id.* at 603-04 (footnotes and citations omitted). Courts since *Brown* have applied this analysis to consents to search following illegal detention. *See United States v. Wellins*, 654 F.2d 550, 552-53 (9th Cir. 1981); *United States v. Taheri*, 648 F.2d 598, 601 (9th Cir. 1981); *United States v. Sanchez-Jaramillo*, 637 F.2d 1094, 1099-1100 (7th Cir.), *cert. denied*, 449 U.S. 862 (1980); *United States v. Perez-Esparza*, 609 F.2d 1284, 1289 (9th Cir. 1979); *United States v. Jones*, 608 F.2d 386, 391-92 (9th Cir. 1979); *United States v. Wilson*, 569 F.2d 392, 396 (5th Cir. 1978).

By analyzing the instant case solely in terms of whether the consent was voluntary, the majority places insufficient weight on the *Brown* factors. For example, the majority in effect states that because defendant Carson was unaware of the previous search, it could not affect the validity of the consent. Slip op. at 26 (citing *Moran v. Burbine*, 54 U.S.L.W. 4265, 4267 (U.S. March 11, 1986)). Thus, under the majority's analysis, the flagrancy of the prior police misconduct is irrelevant unless the defendant is aware of the previous search, in direct contrast to what *Brown* and the circuit cases that have interpreted *Brown* say. The majority opinion in the instant case appears to adopt a per se attenuation rule: If the consent

was freely given, whatever illegalities have gone before are irrelevant. I do not think we can say that in view of *Wong Sun* and *Brown*. Instead we must consider the time span between the two searches, the purpose and flagrancy of the initial police misconduct, and whatever other factors seem relevant in the circumstances of the case before we decide whether exclusion is necessary to deter unconstitutional police conduct and to preserve judicial integrity.

If the initial illegal search in the instant case had been particularly egregious, or if the police had engaged in coercive conduct, I would read *Brown* to require exclusion despite Carson's voluntary consent to the second search. *See Perez-Esparza*, 609 F.2d at 1289. But I would permit the admission of the evidence here. Although an officer first obtained knowledge of the doves by lifting a vest covering a five-gallon pail illegally, this was not an illegal search as flagrant as, for example, breaking into a home or unlawfully tapping a telephone, thus not implicating the deterrence consideration of the exclusionary rule. *Cf. United States v. Leon*, 52 U.S.L.W. 5155, 5157-58 (U.S. July 5, 1984) (exclusionary rule should only be applied when "its remedial objectives are thought most efficaciously served"). Further, there was no hint of coercion. I believe Carson had been an employee of the Fish and Game Commission and apparently knew the officers. The consent to search was freely given. Carson must have known the doves would be found; apparently he was confident that his possession was legal, or that the officers would be unable to prove that the doves were shot that day. In these circumstances I do not believe the second search arose through "exploitation" of the first search within the meaning of *Wong Sun* and *Brown*, despite the short time span between the illegal search

and Carson's consent. *See United States v. Wellins*, 654 F.2d at 555 ("lack of a significant intervening period of time does not, in itself, require that the evidence be suppressed for want of sufficient attenuation.").

Accordingly, I agree that the evidence discovered in the consensual search need not be suppressed.

APPENDIX B

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

OPINION FILED MAY 13, 1985

762 F2d 883

UNITED STATES v. CARSON

CARSON I

(Filed May 13, 1985)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,	)	
v.	)	No. 83-2615
GEORGE L. CARSON, Defendant-Appellee.	)	

Appeal From the United States District Court
for the District of Kansas
(D.C. No. 83-10049-01)

Benjamin L. Burgess, Jr., United States Attorney (Kurt J. Shernuk, Assistant United States Attorney with him on the brief), District of Kansas, Topeka, Kansas, for Plaintiff-Appellant.

Michael S. Holland, Russell, Kansas for Defendant-Appellee.

Before McKAY, BREITENSTEIN and LOGAN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellant-defendant was charged in an information with the unlawful possession of doves contrary to the migratory bird treaties between the United States, Great

Britain and the United Mexican States in violation of 16 U.S.C. § 703, 50 C.F.R. §§ 20.35 and 20.72. He consented to a trial before a United States Magistrate and waived a jury. The magistrate found that he had waived his right to file a motion to suppress. He appealed to the district court which reversed the magistrate and dismissed the action. The United States appeals, we reverse and remand.

On September 17, 1982, the defendant was hunting doves in Russell County, Kansas. Joe Branick, a Russell County deputy sheriff approached him and observed him shooting nine doves. Tr. Vol. II, p. 4-5. While defendant was hunting, Branick looked into a five gallon pail and observed under a vest at least six dressed doves. Id. at 6. Branick also observed the remains of doves scattered on the tops of tall weeds in the field where defendant was hunting. Id. at 7. Branick concluded that these remains were fresh based on the way they clung to the weeds and the color of the blood. Id. Branick then got in touch with Doug Sonntag, a State Game Protector employed by the Kansas Fish and Game Commission concerning the legality of defendant's bag possession. Branick and Sonntag returned to the area where defendant was hunting and asked him for permission to search his pickup. Defendant consented, unlocked the vehicle, took out the pail, and sat in front of Sonntag, who picked up 12 freshly killed doves, lifted up a vest and removed 11 dressed doves. Id. at 11. Sonntag testified that it was his opinion that the dressed doves had been killed earlier that day because they were still warm, of a light pinkish color and their blood was wet and sticky. (Tr. Vol. III, p. 11. A second State Game Protector, Madorin, handled the doves later that evening and concurred with Sonntag that the dressed doves had been killed that day. Id. 25, 27-28.

At trial before the magistrate and during cross-examination, Branick admitted that he lifted up the vest in order to observe the dressed doves. Tr. Vol. II, p. 22. Defendant objected to the evidence from this search later during testimony from Sonntag. Id. at 45. The trial was continued to allow the defendant to file and brief a motion to suppress. Id. at 55-57. The magistrate ruled on May 12, 1983, without a suppression hearing, that the defendant had waived his right to object to the evidence because he failed to file a pre-trial motion to suppress the evidence as required by Fed. R. Crim. P. 12(b)(3). The trial resumed May 23, 1983 and the defendant was found guilty.

The defendant appealed the judgment to the district court who found that the magistrate had abused his discretion in failing to hear the reason for the defendant's failure to file the pre-trial motion to suppress and for failing to address the question of whether the search was legal. The trial court then set aside the conviction and dismissed the action because it determined that Branick's search was illegal.

Defendant contends that the notice of appeal to this court was not timely. On November 10, 1983, the district court stated orally from the bench, Tr. proceedings before the district judge, p. 24:

> "Your [the government's] motion to reconsider is overruled and the defendant's motion to dismiss - - - that is to say, to enter an order of acquittal in behalf of the defendant is sustained."

On the same day the clerk's record, R. 210, shows the entry of the following order:

> "Consistent with the findings of fact and conclusions of law announced this date, the judgment of conviction of the defendant, George L. Carson, entered by the Magistrate on July 13, 1983, should be and is hereby set aside."

On December 5, 1983, the government filed a notice of appeal from this order. This was within the thirty days allowed for an appeal by the government by 18 U.S.C. § 3731 and Fed. R. App. P. 4(b). On November 23, 1983, the court entered its "Memorandum Order Nunc pro Tunc" in which it said "the matter is dismissed with prejudice." The government argues that a notice of appeal should have been filed to the second order.

Defendant's argument is without merit. Nunc pro tunc literally translated means "now for then." A nunc pro tunc order is an order which relates back to a prior date and it will be given an anterior effect. Mitchell v. Overman, 103 U.S. 62, 64-65; Kirtland v. J. Ray McDermott & Co., 5 Cir., 568 F.2d 1166, 1169, n. 5; and 6A Moore's Federal Practice § 58.08. The only difference in the two orders is that in the second the dismissal is with prejudice. The government's appeal was properly filed, timely, and gave the court of appeal jurisdiction.

The magistrate found the defendant guilty and sentenced him to imprisonment for 120 days all of which was suspended except for the first 30 days, which must be served, placed him on probation for two years, and fined him $300.00. Defendant took an appeal to the district court. The court correctly held that the district court hearing was not a trial de novo. See Rules of Procedure for the Trial of Misdemeanors before United States Magistrates. 85 F.R.D. 417, Rule 7(e), and United States v. Hubbard, 10 Cir., 603 F.2d 137, 142.

Rule 12(f), Fed. R. Crim. P., provides that a failure to file a motion to suppress evidence pursuant to Rule 12(b) prior to trial constitutes a waiver of any objections to the introduction of evidence. The magistrate ruled that the defendant had waived his rights to move to suppress. The court held that he was wrong in so doing. The government reports available to the defendant stated only that Branick observed the dressed doves in the pail, not that he had conducted a search. The district court correctly held that the magistrate should have granted relief from the waiver provisions of Rule 12(f). The search by Branick when he picked up the vest to reveal the six dressed doves was in violation of the Fourth Amendment in that the dressed doves were not in plain view.

Neither the court nor the magistrate discussed the second search. The officers returned to the area and encountered defendant at his pickup. Defendant testified, Tr. Vol. III, pp. 60-64:

> "Q. What occurred when the two of them came to the pickup?
>
> A. We stood around talking a little bit, and just visiting. Mr. Branick said, well George, he said, I want to tell you that I think you shot too many doves and I couldn't believe it. I thought, uh, oh, here we go again. So I asked him, I said what makes you think that? And he said because I saw some feathers and some blood and something else, he said, sticking in some weeds or something, which I never did see, quite frankly.
>
> Q. Did he tell you at that time he had searched your bucket?
>
> A. No, he did not.

Q. Okay, what else did he say?

A. Well, he asked again, Mr. Branick asked if he could . . . if they could look into my pickup and I said, well certainly. . . .

Q. What happened then?

A. We got back to the . . . the pickup where the vehicles were. I unlocked the truck on the driver's side. I reached across the passenger side and got the bucket and brought it out toward the rear of my pickup and set it on the ground. Mr. Sonntag then proceeded to take the freshly killed undressed doves off the top of the hunting jackets, laid them on the ground. Then he lifted out two hunting jackets, then lifted off the plastic bag. . . .

Q. Now, in regard to the doves, how many dressed doves were there?

A. There were 12."

A search conducted pursuant to a voluntary consent is valid for Fourth and Fourteenth Amendment purposes. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 248. The defendant admits that he consented to the second search and that he was unaware of Branick's prior search. Tr. Vol. III, p. 61.

Assuming that the first search was illegal, defendant's consent purged the second search of any taint from the first search and validated the second search for Fourth Amendment purposes. In United States v. Fike, 5 Cir., 449 F.2d 191, 192-193, the Fifth Circuit faced an almost identical situation. The officers conducted a search of a car which the court assumed was illegal. The officers then took the occupant and the car into custody. At the

sheriff's office the officers asked the occupant's permission to search the car and it was given. The evidence obtained from the second search was admitted at the trial and the defendant was convicted. On appeal, the defendant argued that the evidence obtained by the second search was not admissible under Wong Sun v. United States, 371 U.S. 471, because it was the fruit of the first search. The Fifth Circuit held that the defendant's voluntary consent to the second search was an independent act "sufficient to break the causal connection between the alleged primary illegality and the evidence found as the result of the second search." Fike, supra, 449 F.2d at 193. See also, United States v. Galante, 2 Cir., 547 F.2d 773, 741-742, cert. denied 431 U.S. 969.

One thing further must be mentioned. The information charges that on September 17, 1982, the defendant "did unlawfully possess more than the daily bag limit of doves" in violation of 16 U.S.C. § 703, 50 C.F.R. 20.35 and 50 C.F.R. 20.72. Section 20.35, 50 C.F.R, provides:

> "No person shall possess, have in custody, or transport more than the daily bag limit or aggregate daily bag limit, whichever applies, of migratory game birds . . at or between the place where taken and either (a) his automobile or principal means of land transportation. . . ."

Section 20.72, 50 C.F.R. reads:

> "No person shall at any time, by any means or in any manner, take, possess, transport or export any migratory bird . . . in violation of any applicable law or regulation of any State."

The Kansas regulations provide for a daily bag limit of 12 doves and a possession limit of 24. See Kansas Fish

& Game Commission, 1982 Kansas Hunting and Trapping Regulations, Exhibit A, attached to defendant's motion to dismiss. R. 34. The Kansas Fish & Game Commission also states that, "No person shall possess more than one daily bag limit in the field, or returning from the field to one's car, hunting camp, motel, etc."

Defendant argues that he was charged with one crime, possessing more than the daily bag limit, but convicted of another crime, killing more than the daily bag limit. The Kansas officials testified that all 23 were killed on the same day. Tr. Vol. II, p. 12, 29-30, Tr. Vol. III, p. 11, and 27-28. The defense called an expert witness, Dr. William G. Eckhardt, a pathologist, who testified, Tr. Vol. III, p. 81:

> "Q. Without performing the post mortem tests, can there be any conclusive opinion rendered as to the time these birds were killed, Doctor?
>
> A. Not in my opinion, no."

With reference to the testimony of Dr. Eckhardt, the magistrate said, Tr. Vol. III, p. 125:

> "But I simply give more weight to the testimony of the witnesses Sonntag and Branick that I do Dr. Eckhardt. Dr. Eckhardt did not examine these doves or these birds at any time near the time they were taken at all, and he just can't know as much about it, it seems to me, as to this particular case, as these people did in the field. . . . It's a hypothetical question so far as he was concerned."

The magistrate found that the defendant had killed the doves all on the same day, saying, Tr. Vol. III, p. 138: "I simply find that he actually killed these birds on the

same day, that is the 17th day of . . . September, 1982." Killing the birds is a necessary antecedent to possession of the birds. If defendant killed the birds on September 17, 1982, he possessed them on the same day. That is what the information charged. We cannot read the charge or the law to permit possession in defendant's car of more than one daily bag limit if defendant killed all of the birds on the same day. The magistrate properly found possession. The evidence is sufficient to sustain the charge of the indictment.

The argument is that the defendant's consent to the second search was brought to the attention of the trial court but not considered by it. Because the validity of the second search involves a question of fact, the voluntary consent to the second search, the district court, on remand, may wish to remand the case to the magistrate for determination of the facts.

Reversed.

APPENDIX C

August 1, 1985, Memorandum and Order of the United States District Court for the District of Kansas per Order of Remand from Tenth Circuit Court of Appeals, *Carson II*.

United States District Court Case No. 83-10049-01

(Filed August 1, 1985)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 83-10049-01
GEORGE L. CARSON, Defendant.	)	

MEMORANDUM AND ORDER

This matter involves a motion to suppress in a case in which the defendant is charged with unlawful possession of protected migratory birds in excess of the daily bag limit, in violation of 16 U.S.C. §703. This matter was originally before the Court on the defendant's appeal from the Magistrate's orders, in which the Magistrate held that the defendant waived his right to raise a motion to suppress, and found the defendant guilty. This Court found the Magistrate abused his discretion in refusing to consider the merits of the motion to suppress, found the search unlawful, granted the motion to suppress, and entered judgment of acquittal. The United States appealed this Court's order to the Tenth Circuit Court of Appeals. The Court of Appeals reversed this Court, holding the defendant's consent to a search following an earlier illegal search purged the second search of the taint of illegality and validated the second search for Fourth Amendment purposes. The Court of Appeals remanded to this Court for a fact finding as to the validity of the defendant's consent. This Court heard oral argument on the consent question on July 12, 1985, and now finds there was a full and voluntary consent to the second search and reinstates the conviction of the defendant.

The facts of this case are that defendant George L. Carson, at the time of the incident, was employed as a wildlife biologist by the Kansas Fish and Game Commission. On September 17, 1982, Mr. Carson was hunting doves. Joe Branick, a Russell County Deputy Sheriff, was investigating the theft of some shotgun shells and approached Mr. Carson, who was in a wheat stubble field sitting on a five-gallon pail hunting turtle doves. Mr. Branick observed Mr. Carson shoot nine turtle doves. When Mr. Carson walked into the field, Mr. Branick searched Mr. Carson's pail, looking for evidence of the stolen shells. Mr. Branick observed several freshly killed doves on top of a hunting vest, lifted the hunting vest, and observed six dressed doves. Mr. Branick had no cause to believe that Mr. Carson had killed more than his daily bag limit at the time Mr. Branick searched the bucket. (Docket No. 3, p. 23.) As Carson and Branick left the field, Branick observed feathers and other remains of doves clinging to weeds and on the ground in an area where Mr. Carson picked up a shotgun he had left earlier that day.

Mr. Branick left Mr. Carson and contacted Doug Sonntag, a state fish and game officer, to inquire whether Mr. Carson had exceeded his daily bag limit. Mr. Branick and Mr. Sonntag returned to the field and asked Mr. Carson if they could look inside his hunting pail. Mr. Carson consented. Mr. Sonntag removed 12 freshly killed doves from on top of the vest, lifted up the vest and removed 11 dressed doves. The Kansas regulations provide for a daily bag limit of 12 doves and a possession limit of 24. The Magistrate found that all 23 doves had been killed the same day, and found the defendant guilty of the charge.

The Tenth Circuit Court of Appeals, in reversing this Court's suppression of the evidence, held that the defendant's consent, if voluntary, vitiated any illegality of the first search. The Court of Appeals stated as follows:

> The district court correctly held that the magistrate should have granted relief from the waiver provisions of Rule 12(f). The search by Branick when he picked up the vest to reveal the six dressed doves was in violation of the Fourth Amendment in that the dressed doves were not in plain view.

United States v. Carson, No. 83-10049-01, slip op. at 5 (10th Cir. May 13, 1985). The Court of Appeals then went on to discuss the effect of the defendant's consent to the subsequent search. The Court stated as follows:

> A search conducted pursuant to a voluntary consent is valid for Fourth and Fourteenth Amendment purposes.
>
> * * *
>
> Assuming that the first search was illegal, defendant's consent purged the second search of any taint from the first search and validated the second search for Fourth Amendment purposes.

Id. at 7, citing *United States v. Fike*, 449 F.2d 191, 192-93 (5th Cir. 1971). The Court remanded, stating:

> Because the validity of the second search involves a question of fact, the voluntary consent to the second search, the district court, on remand, may wish to remand the case to the magistrate for determination of the facts.

Id. at 10.

I.

The Court first addresses the question of fact concerning the voluntariness of the consent to the second search. At the July 25, 1985 oral argument, counsel for both parties agreed that the trial record was sufficient for this Court to make a finding of fact as to whether Mr. Carson's consent was voluntary.

The United States points to three places in the record in which Mr. Carson consented to the search. In Mr. Carson's letter of September 9, 1982, to Steve Sorenson, Mr. Carson wrote, "He [Mr. Branick] then asked if they could search my truck. I said, sure!" (Govt. Tr. Ex. 11, p. 3.) At trial, Mr. Carson testified, "Well . . . Mr. Branick asked if he could . . . if they could look into my pickup and I said, well certainly. . . ." (Tr. Vol. III, p. 61.) Mr. Carson testified further, ". . . Detective Branick was ransacking my truck. He asked me to unlock my tool box, which I did gladly, while they were searching." (*Id.* at 62.)

The defendant argues that the failure of the county deputy sheriff and the state game protector to inform Mr. Carson of the initial search deprived defendant of his ability to make a voluntary and intelligent consent to the search.

A search conducted pursuant to consent is an exception to the requirements of both a warrant and probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Valid consent must be freely and voluntarily given, and not the result of coercion or duress, express or implied. *Id.* Voluntariness is a question of fact to be determined from the totality of the circumstances. *Id.; United States v. Shields*, 573 F.2d 18 (10th Cir. 1978). One factor in

determining whether the individual consented is whether he knew or was advised of his right to refuse the search. *Id.* Nonetheless, the government is not required to advise an individual of his right to withhold consent in order to find a voluntary consent. *Shields, supra.* Moreover, the prosecution is not required to demonstrate as a prerequisite to establishing voluntary consent, that the individual had knowledge of or was advised of his right to refuse. *Schneckloth, supra.*

The law, as stated above, is that the government need not advise an individual of his constitutional right to withhold consent to search. There is no authority for the defendant's argument that the government must disclose the facts, for example, of prior surveillance in order for a subsequent consent to be voluntary. On the facts of the case at bar, this Court rejects defendant's assertion that the county sheriff and state game protector were required to advise Mr. Carson of the initial search in order for Mr. Carson's consent to be knowing and voluntary.

This Court, having reviewed the transcript and record of trial proceedings before the Magistrate, and with particular reference to the testimony and evidence quoted above, finds that under the totality of the circumstances, Mr. Carson's consent was the product of his own free will and unconstrained choice. The Court finds that Mr. Carson's consent to the search was voluntary.

II.

The defendant additionally contends that the Tenth Circuit Court of Appeals remanded the case to this Court to make a fact finding not solely on the issue of whether the consent was voluntary, but also as to all facts sur-

rounding the validity of the consent. The defendant argues that even if this Court finds the consent was valid, under the facts of this case the consent was not an independent act sufficient to break the causal connection between the primary illegality and the evidence found as a result of the second search. This Court agreed to consider the defendant's argument concerning attenuation of the taint, requested the United States to submit a reply brief on the issue, and entertained oral argument on the issue.

The defendant argues that the challenged evidence was the direct result of the state's illegal conduct because the officers requested defendant's consent on the basis of what Branick illegally discovered in the first search, and therefore, the consent was not sufficiently independent of the illegality to break the causal connection between the illegality and the discovered evidence. The defendant argues that the challenged evidence is a direct result of the government's exploitation of the initial illegal search, a taint the defendant's consent cannot cure. The defendant strenuously argues that the challenged evidence was the direct result of illegal government conduct because the second search yielded the identical evidence as the earlier illegal search. Defendant argues that a consent cannot cure the illegal taint if what is ultimately discovered and offered at trial is the very same evidence discovered as a result of illegal governmental intrusion.

On the other hand, the United States argues that a consent, so long as it is voluntary, will always break the causal connection between any illegality and any evidence discovered subsequent to the consent. The United States argues that consent is an independent act of the defendant's free will, determined by the defendant's actions and

state of mind, and is totally unrelated to any conduct—legal or illegal—of government officials. The United States totally rejects defendant's argument that there is any distinction whether the evidence discovered pursuant to illegal conduct is the "identical evidence" as that discovered pursuant to lawful means, or whether evidence discovered pursuant to illegal conduct is "new or different evidence" as that discovered pursuant to lawful means. The United States asserts, moreover, that under the inevitable discovery doctrine, the doves discovered as a result of the initial illegal search would have inevitably been discovered as a result of defendant's later consent.

The Court of Appeals for the Tenth Circuit, in the appeal of the case at bar, relied on the case of *United States v. Fike,* 449 F.2d 191 (5th Cir. 1971), in holding that defendant's consent, if voluntary, purged the second search of any taint from the first search and validated the second search for Fourth Amendment purposes. *United States v. Carson,* No. 83-2615, slip op. at 7 (10th Cir. May 13, 1985).

In *United States v. Fike,* the police conducted two separate searches; articles discovered pursuant to the first search were not introduced at trial; evidence discovered pursuant to Fike's consent was different than the items discovered in the first search, and evidence discovered pursuant to the second consensual search was introduced and admitted at trial. The Fifth Circuit in *Fike* held that although the police would not have asked Fike to consent to a search "but for" the first illegal search, evidence discovered as a result of the second consensual search was admissible because Fike's consent purged the taint. The Fifth Circuit stated as follows:

> It is possible that "but for" the first search the police would not have taken the car, would not have

> taken the defendant into custody, and would not have conducted the second search which yielded the challenged evidence. However, assuming, but not deciding, that the first search was illegal, we hold that the evidence gained as a result of the second search, the only evidence of which the defendant complains, was admissible. This is so because the voluntary consent of the defendant to the second search, found by the district court and affirmed by this Court, was an independent act sufficient to break the causal connection between the alleged primary illegality and the evidence found as a result of the second search and admitted at trial. The consent not only, as discussed above, served to validate the second search for Fourth Amendment purposes but also purged the second search of the "primary taint."

Id. at 193.

Defendant Carson contends that the facts of the instant case are distinguishable from the facts of *United States v. Fike* and require a contrary legal result. Mr. Carson argues that in *Fike* an initial illegal search yielded evidence which caused the police to secure the defendant's consent to a second search which yielded different, admissible evidence. In the case at bar, on the other hand, the initial illegal search yielded the doves in excess of the daily bag limit, this illegally discovered evidence motivated the police to secure Mr. Carson's consent to a second search, and the second search yielded the same proceeds and the police did not "discover" anything they didn't already know.

Mr. Carson argues that the better rule to govern his case under the facts is that presented in *United States v. Melendez-Gonzalez,* 727 F.2d 407 (5th Cir. 1984), which

the Fifth Circuit decided ten years after its decision in *Fike*. In *Melendez-Gonzalez*, border patrol agents in Texas stopped a car that was 60 miles from the United States-Mexico border with no reason to suspect that the car was carrying illegal aliens or contraband. Using a flashlight, the agents peered into a small hole in the trunk and observed a burlap-covered object. The agents asked the driver to open the trunk, but he refused. The agents used a tire tool to partially spring the lid of the trunk, and observed a large burlap sack and smelled marijuana. The agents took the driver and his passenger to the station and read them their *Miranda* rights. While in custody, the driver signed a consent to search form. The agents pried open the trunk and found 21 pounds of marijuana. The trial court held the initial stop and subsequent search were legal, or in the alternative, that the voluntarily signed consent form vitiated any illegality of the initial stop and search. The Fifth Circuit reversed, finding that both the stop and the search were illegal, and that the consent was too late to vitiate the illegality because the illegal stop and search had already been conducted by the time the consent form was signed. The Fifth Circuit stated as follows:

> We find the district court's conclusion with regard to consent incorrect as a matter of law. We do not dispute the fact that defendant actually signed the consent form, or even that he did so voluntarily, further, we accept the well-established rule that "a search conducted pursuant to consent is excepted from requirements of probable cause and warrant." *There is no authority, however, which justifies an earlier illegal search based upon a later consent to an additional search.*
>
> * * *

> Since for all practical purposes, the search was conducted on the highway, the consent form which defendant signed at the station simply came too late.

Id. at 413-14 (citations omitted).

Mr. Carson argues that the facts of his case are consistent with the facts of *Melendez-Gonzalez* in that the second search pursuant to his consent yielded the same evidence discovered by Branick in his initial illegal search, and therefore, the evidence must be suppressed.

Mr. Carson argues that further authority for his argument is the recent United States Supreme Court case of *Segura v. United States*, 82 L.E.2d 599 (1984). The Court of Appeals held that evidence discovered in plain view subsequent to an initial illegal entry must be suppressed, but evidence later discovered pursuant to a search warrant was admissible. The Supreme Court held that evidence discovered in the second search which was based upon a valid search warrant issued wholly on information known to the police before their initial illegal entry was admissible because the evidence was discovered from an independent source.

However, the issue of the admissibility of the evidence discovered first in plain view following the initial illegal entry, and again discovered along with other evidence pursuant to the warrant, was not before the Supreme Court. *Id.* at 607 n. 4. Thus, as the United States points out in its brief, atlhough evidence discovered pursuant to illegal conduct was treated differently by the lower courts than evidence discovered pursuant to the warrant, this distinction was not a basis for the Supreme Court's ruling. Although the practical result of the case is consistent with the defendant's argument, it was not a legal rationale employed by the Supreme Court, and for this reason does

not directly support Mr. Carson's argument. The *Segura* case, nevertheless, is an example of the independent source exception to the exclusionary rule, and clearly points out the requirement that in order for some intervening act to purge the illegality, it must come from a source wholly unconnected and wholly unrelated to the initial illegal conduct.

Finally, Mr. Carson argues that even if his consent was voluntary, his consent derived from the government's exploitation of its prior illegal activity and, under the facts of this case, his consent was not sufficiently independent of that illegality to be purged of the primary taint. Mr. Carson refers to the case of *McGinnis v. United States,* in which the court stated as follows:

> A federal agent cannot participate in an unlawful search, and then on the basis of what he observed in the course of that search, and on that basis alone, go to the United States Commissioner and swear out a search warrant. Such a search warrant, and the evidence procured in the course of a search thereunder, would be merely the illegal product of a previous unlawful search by federal authorities. . . .

227 F.2d 598, 603 (1st Cir. 1955). Mr. Carson further argues, relying on *United States v. Caldwell,* 750 F.2d 341 (5th Cir. 1984), as follows:

> The test for determining whether evidence is "fruit of the poisonous tree" is "whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. at 343, *citing Wong Sun v. United States,* 371 U.S. 471 (1963).

On the other hand, the United States argues that in spite of any illegality of the first search, the evidence is admissible under the inevitable discovery doctrine, citing the recent United States Supreme Court case of *Nix v. Williams,* 81 L.Ed.2d 377 (1984). The inevitable discovery doctrine means that evidence that is the product of illegal governmental conduct is nonetheless admissible if the prosecution establishes by a preponderance of the evidence that the information or evidence ultimately or inevitably would have been discovered by lawful means. In *Nix,* the defendant Williams was in custody, being transported to detainment, and there was an agreement between Williams' counsel and the police and prosecution that Williams would not be questioned in the absence of counsel. Nonetheless, when police were transporting Williams, the police initiated a casual conversation which elicited incriminating remarks from the defendant, and led the police to the body. The body was located in an area which was clearly within the area to be searched. The Court held that the evidence would have been inevitably discovered in spite of any alleged violation of the defendant's constitutional rights, and held the evidence was properly admitted at trial.

In the case at bar, Deputy Sheriff Branick went to the area where Mr. Carson was hunting because Mr. Branick was investigating the theft of some shotgun shells. Mr. Branick observed that the shells used by Mr. Carson were not the same number shot as those reported stolen. When Mr. Carson was away from his hunting pail, Mr. Branick searched the pail. Mr. Branick discovered an unknown number of freshly killed doves and about six cleaned or dressed doves. The United States concedes that this was an illegal search. Mr. Branick observed Mr. Carson shoot nine doves. As Mr. Branick and Mr.

Carson were walking out of the field, Mr. Branick observed the remains of doves in an area where Mr. Carson picked up a shotgun he had left earlier. Mr. Branick testified he did not know from how many doves the remains came. Mr. Branick was not a game warden. Mr. Branick had no idea of what the daily bag limit was. The Court must determine, based on Mr. Branick's observation of Mr. Carson shooting nine doves and his observation of dove remains coming from an unknown number of doves, and without the benefit of Mr. Branick's illegal search, whether Mr. Branick would have inevitably secured Mr. Carson's consent to search his bucket. This Court find that a deputy sheriff's observation of an individual shooting nine doves and the remains of some unknown number of doves in weeds would not be sufficient reason for a deputy sheriff who had no knowledge of the daily bag limit to request consent to search a hunter's pail. This Court finds that the United States has failed to prove by a preponderance of the evidence that Mr. Branick or Mr. Sonntag would have requested consent to search the hunting pail absent the illegal search, and finds that they would not have inevitably discovered the 23 doves. Thus, this Court expressly finds that the inevitable discovery doctrine does not apply to the facts of this case.

In the final analysis, this Court views the issue as whether a voluntary consent to search will always constitute a sufficient independent act to break the causal connection between illegal governmental conduct and the challenged evidence. The Tenth Circuit Court of Appeals in the instant case stated, "[D]efendant's consent purged the second search of any taint from the first search and validated the second search for Fourth Amendment purposes." Slip op. at 7, *citing United States v. Fike*. Never-

theless, the Fifth Circuit Court of Appeals, in a case decided 10 years after it decided *Fike*, held that a voluntary consent given after an illegal search did not purge the taint when the consensual search yielded the same evidence previously discovered illegally. The Fifth Circuit stated, "There is no authority, however, which justifies an earlier illegal search based upon a later consent to an additional search." *Melendez-Gonzalez, supra*, at 414. This Court believes the facts of this case are governed by the *Melendez-Gonzalez* case. Specifically, under the facts of the case at bar, this Court finds that the challenged evidence derived directly from the first illegal search; Carson's consent was not independent of the illegality because the officers would not have requested consent but for the first illegal search; and defendant's consent, however voluntary, did not break the causal connection between the first illegal search and the challenged evidence discovered in the second search.

Nevertheless, this Court is hardly in a position to reverse the Tenth Circuit Court of Appeals. It is possible that when an individual's consent to a governmental search is the product of that individual's free will, the consent will always be an act so independent of the illegal governmental conduct that voluntary consent alone will vitiate the taint of the prior illegality. When, however, as the Court has found in this case, the government's request for consent to search is motivated by critical information ascertained by the prior illegal conduct of the government, this Court questions how the individual's voluntary consent alone can realign the government's actions within the bounds of the Fourth and Fourteenth Amendments. Most importantly, the Court questions a rule of law which allows the government to make a surreptitious entry into

the home of a citizen, conduct an illegal wiretap or perform any other illegal conduct invasive of a citizen's privacy, and then, on the basis of the information gleaned from this illegal conduct, cajole the consent of the unwitting citizen, and then find that incriminating evidence discovered is admissible evidence in a criminal prosecution of that citizen. This Court believes that such law would fly directly in the face of the Fourth Amendment. Indeed, the Fourth Amendment protects private citizens against this very kind of governmental interference.

Nevertheless, this Court recognizes that an individual's consent, when it is knowing and completely voluntary, may be in itself an independent act sufficiently removed or attenuated from the illegal conduct of the government to permit the use of the discovered evidence in a criminal trial against that individual. In spite of the severe and fundamental problems this Court has with the application of such a rule to the facts of the case at bar, this Court is not in a position to reverse the Tenth Circuit Court of Appeals and must proceed with the disposition of this case in accordance with the Circuit Court's remand.

Therefore, the only issue which is actually before this Court is the factual determination of whether Mr. Carson voluntarily consented to the search, and this Court finds that Mr. Carson gave his full and voluntary consent to the search.

IT IS THEREFORE ORDERED this 31 day of July, 1985, in accordance with the decision of the Tenth Circuit Court of Appeals, the defendant's conviction is affirmed.

/s/ Patrick F. Kelly
Patrick F. Kelly, Judge

APPENDIX D

JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

United States of America vs.

United States District Court for

DEFENDANT: GEORGE L. CARSON

THE DISTRICT OF KANSAS

DOCKET NO. 82-1155M-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: July, DAY: 13, YEAR: 1983

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Michael Holland
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/~~xxxxx~~of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully possessing more than the daily bag limit of doves, a migratory bird included in the terms of the conventions between the United States and Great Britian for the protectio of migratory birds concluded August 16, 1916 (39 Stat. 1702), and the United States and the United Mexican States for the protection of migratory birds and game mammals condluded February 7, 1936, in violation of 16 U.S.C. 703. 50 C.F.R. 20.35 and 50 C.F.R. 20.72

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 120 days; Defendant shall pay a fine of $300.00 and his hunting privileges are hereby suspended during the probationary period.

Defendant is placed on probation for a period of 2 years upon the conditions that he serve 30 days in confinement and thereafter abide by the usual conditions of probation.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that said $300.00 fine be paid to the Clerk of the District Court during the first year of the probationary period under the direction and supervision of the U. S. Probation Department.

IT IS FURTHER ORDERED that execution of the entire sentence be stayed until Defendant's appeal, presently pending, becomes final.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

FILED
JUL 15 1983
ARTHUR G. JOHNSON, Clerk
/s/S. Morris
By _____ Deputy

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[ ] U.S. District Judge

[X] U.S. Magistrate

/s/ JOHN B. WOOLEY
JOHN B. WOOLEY

Date 2-15-83

ATTEST: A true copy
ARTHUR G. JOHNSON, Clerk
By S. Morris
Deputy

BEST AVAILABLE COPY

(Filed November 10, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 83-10049-01
GEORGE L. CARSON, Defendant.	)	

MEMORANDUM ORDER

Consistent with the findings of fact and conclusions of law announced this date, the judgment of conviction of the defendant, George L. Carson, entered by the Magistrate on July 13, 1983, should be and is hereby set aside.

IT IS SO ORDERED this 10th day of November,

(Filed November 23, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Criminal Action
v.	)	
	)	No. 83-10049-01
GEORGE L. CARSON, Defendant.	)	

MEMORANDUM ORDER
NUNC PRO TUNC

Consistent with the findings of fact and conclusions of law announced this date, the judgment of conviction of the defendant, George L. Carson, entered by the Magistrate on July 13, 1983, should be and is hereby set aside and this matter shall be dismissed without prejudice.

IT IS SO ORDERED this 23 day of November, 1983.

/s/ Patrick F. Kelly
Patrick F. Kelly, Judge

Supreme Court, U.S.
FILED
OCT 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-144 (2)

In the Supreme Court of the United States

OCTOBER TERM 1986

GEORGE L. CARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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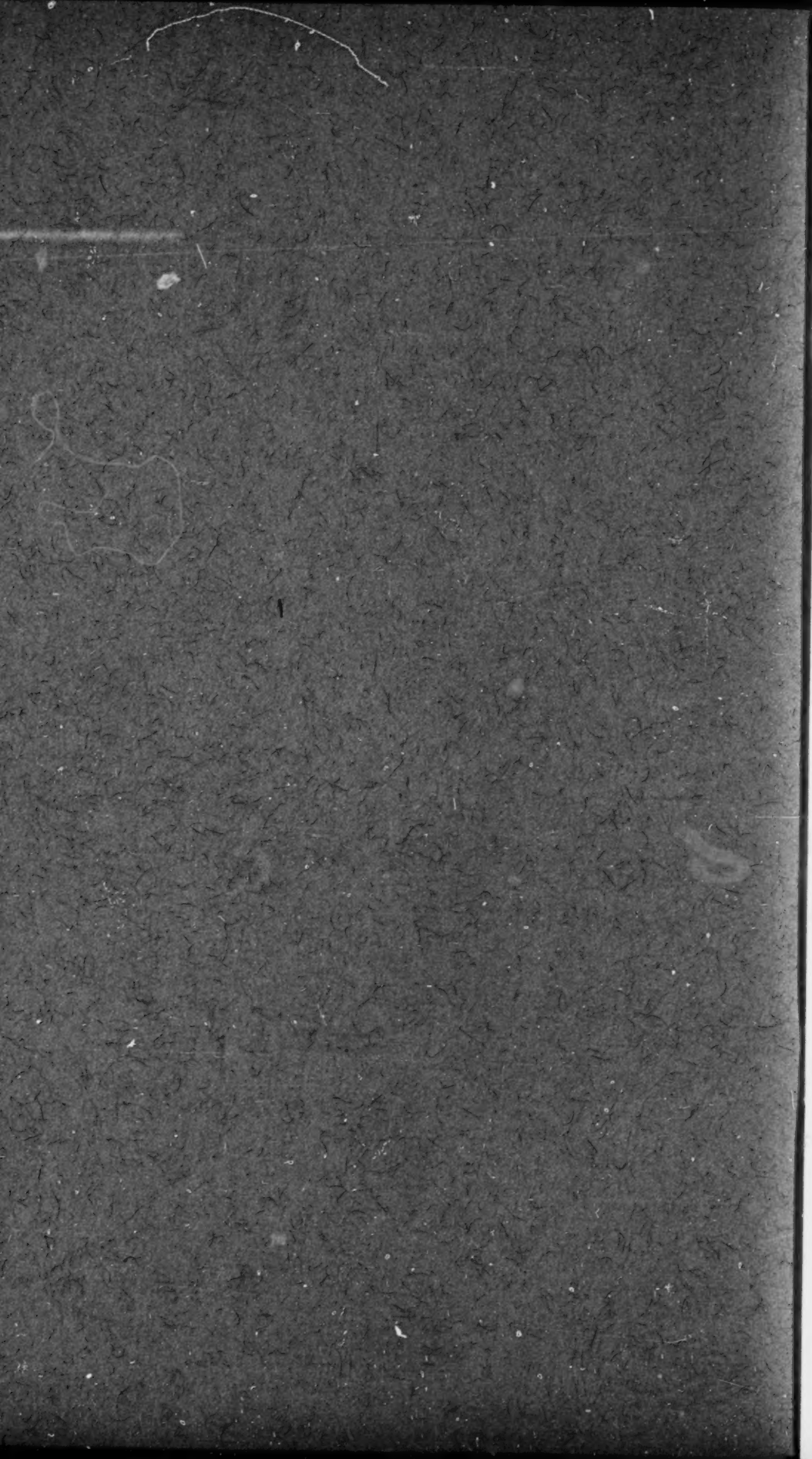

QUESTION PRESENTED

Whether the court of appeals erred in holding that evidence seized as a result of a search to which the defendant voluntarily consented is admissible even though law enforcement officers previously viewed part of the evidence during an illegal search.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Brown v. *Illinois*, 422 U.S. 590 ..... 5, 6, 8, 10

Cardwell v. *Lewis*, 417 U.S. 583 8

Dunaway v. *New York*, 442 U.S. 200 5

Fraternal Order of Eagles, No. 778 v. *United States*, 57 F.2d 93 11

Lewis v. *United States*, 385 U.S. 206 11

McGinnis v. *United States*, 227 F.2d 598 11

New York v. *Class*, No. 84-1181 (Feb. 25, 1986) 8

Schneckloth v. *Bustamonte*, 412 U.S. 218 ..... 4, 5

Taylor v. *Alabama*, 457 U.S. 687 5

United States v. *Bailey*, 628 F.2d 938 11

United States v. *Bazinet*, 462 F.2d 982, cert. denied, 409 U.S. 1010 6

United States v. *Ceccolini*, 435 U.S. 268 8

United States v. *Cherry*, 759 F.2d 1196 ..... 9, 10

Page

Cases—Continued:

United States v. *Crews*, 445 U.S. 463 8
United States v. *Fike*, 449 F.2d 91 9
United States v. *Melendez-Gonzalez*, 727 F.2d 407 ..... 6, 7, 8, 9
United States v. *Mullens*, 536 F.2d 997 6
United States v. *Race*, 529 F.2d 12 6
United States v *Recalde*, 761 F.2d 1448 10
United States v. *Sanchez-Jaramillo*, 637 F.2d 1094, cert. denied, 449 U.S. 862 6
United States v. *Wellins*, 654 F.2d 550 6
United States v. *Wilson*, 569 F.2d 392 10
Wong Sun v, v. *United States*, 371 U.S. 471 3

Constitution, statute, and regulations:

U.S. Const. Amend. IV 6, 8, 9
Migratory Bird Treaty Act, 16 U.S.C. 707(a) 2
50 C.F.R. 20.35 2
50 C.F.R. 20.72 2

In the Supreme Court of the United States

OCTOBER TERM 1986

No. 86-144

GEORGE L. CARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A37) is reported at 793 F.2d 1141. The earlier opinion of the court of appeals (Pet. App. A39-A47) is reported at 762 F.2d 833. The opinion of the district court on remand after the first appeal (Pet. App. A49-A63) is reported at 614 F. Supp. 507. The prior orders of the district court and magistrate (Pet. App. A64-A68) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1986. The petition for a writ of certiorari was filed on July 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On the afternoon of September 17, 1982, Joe Branick, a deputy with the Russell County, Kansas, Sheriff's Department, saw petitioner hunting turtledoves in a wildlife management area. Branick approached petitioner and engaged him in conversation. When petitioner went to retrieve a dove he had shot, Branick looked into a five-gallon pail that petitioner was using. Under a vest that was lying in the pail, Branick saw several dressed (*i.e.*, cleaned) doves. He also saw the remains of other doves scattered in the weeds near where petitioner was hunting. Pet. App. A4.

Branick then left the field and contacted Doug Sonntag, a state game protection officer, to determine whether petitioner's possession of so many doves was lawful. Sonntag informed Branick that petitioner could not lawfully "bag" more than 12 turtledoves in a day. Sonntag and Branick then returned to the wildlife management area and asked petitioner for permission to search his truck. Petitioner agreed to let them do so. In the truck, Branick and Sonntag found the pail, which contained at least 23 doves. Branick and Sonntag seized the doves. Pet. App. A4, A50. The government subsequently charged petitioner with being in possession in the field of more than his lawful "daily bag limit" of birds, in violation of the Migratory Bird Treaty Act (16 U.S.C. 707(a)) and its implementing regulations (see 50 C.F.R. 20.35 and 20.72).

2. At trial, petitioner moved to suppress the doves that Branick and Sonntag had seized. A magistrate ruled that petitioner had waived his right to object to the admission of that evidence, since petitioner had not filed a pretrial suppression motion. The magistrate then found petitioner guilty. Pet. App. A49, A65.

The district court overturned the magistrate's order. It found that the magistrate should have considered petitioner's suppression motion, that Branick's first search was

unlawful, and that the doves seized in the second search should have been excluded as the fruit of Branick's illegal first search. *Id.* at A49. Accordingly, the court directed that petitioner be acquitted (*id.* at A67-A68).

The court of appeals reversed (Pet. App. A39-A47). The court agreed that Branick's first search had violated the Fourth Amendment, because "the dressed doves [had] not [been] in plain view" (*id.* at A43). But the court disagreed that the doves were inadmissible as the fruit of an illegal search since petitioner's consent to the search of his truck, if voluntary, would have "purged the second search of any taint from the first search and validated the second search for Fourth Amendment purposes" (*id.* at A44). However, since the voluntariness of petitioner's consent was a question of fact that the district court had not previously considered, the court remanded the case for further findings on that issue (*id.* at A47).

On remand, the district court found that "there was a full and voluntary consent to the second search" (Pet. App. A49; see also *id.* at A52-A53). The court also rejected petitioner's alternative argument that, even assuming voluntariness, "consent [is] not an independent act sufficient to break the causal connection between the primary illegality and the evidence found as a result of the second search" (*id.* at A54). The court found this alternative argument foreclosed by the court of appeals' earlier holding in the case (*id.* at A62-A63).

3. The court of appeals affirmed (Pet. App. A2-A37). It noted that, in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), this Court held that evidence should not be excluded simply because the government would not have discovered it "but for" an illegal search or seizure (*id.* at A10-A12). Rather, the court noted, *Wong Sun* held that evidence should be excluded only when it is obtained through

"exploitation of [the] police illegality or by means [in]sufficiently distinguishable to purge [its] taint" (*id.* at A12). The court then determined that "[e]vidence obtained pursuant to consent 'has been come at' by defendant's *grant* of consent, not by the police request" (*ibid.* (emphasis in original)). Therefore, the court held, where evidence is derived from a consent search, "[the court] must focus on the voluntariness of [the] defendant's consent, not [on] the police officers' reasons for requesting consent" (*id.* at A14).

The court further ruled that "evidence obtained pursuant to defendant's consent is admissible only if defendant's grant of consent is voluntary under the totality of the circumstances" (Pet. App. A13, citing *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973)). This means, the court said, that consent can purge the taint of a prior illegality only when it is " 'freely and intelligently' given * * * without duress or coercion, express or implied" (Pet. App. A15-A16 (citation omitted)). The court of appeals concluded that "[t]he factors articulated in *Brown* v. *Illinois*[, 422 U.S. 590, 603-604 (1975),] are examples of the kinds of facts which a court should consider in [determining whether a] defendant's consent [is] within Fourth Amendment voluntariness standards" (Pet. App. A19).

Judge Logan concurred (Pet. App. A34-A37). He expressed concern that, under the majority's analysis, "the flagrancy of the prior police misconduct [would be] irrelevant unless the defendant is aware of the previous search * * *" (*id.* at A35)." Since the illegal activity in this case was not flagrant, however, and since there was "no hint of coercion" in the request for petitioner's consent to the search (*id.* at A36), Judge Logan agreed that the seized doves had been properly used to convict petitioner (*id.* at A37).

ARGUMENT

1. Petitioner contends that the court of appeals erred in ruling that evidence perceived during an illegal search is admissible if a defendant voluntarily consents to a subsequent search that results in the seizure of that evidence. Pet. 6-14. But the court's holding follows from this Court's decisions in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), and *Brown* v. *Illinois*, 422 U.S. 590 (1975).

In *Schneckloth*, this Court held that a search conducted pursuant to a defendant's consent need not be based on probable cause and that evidence obtained from a consent search is admissible if the consent was voluntary in the totality of the circumstances, *i.e.*, if the defendant's will was not overborne (412 U.S. at 222-223, 226). In *Brown*, the Court reaffirmed that evidence need not be excluded simply because the government would not have seized it "but for" an illegal search (422 U.S. at 597-600). Specifically, the Court held that a confession can be admissible even though it follows a Fourth Amendment violation, if the government shows that the confession is "sufficiently an act of free will to purge the primary taint" (*id.* at 602 (citation omitted)). If the suspect "decide[s] to confess, as an act of free will unaffected by the initial illegality" (*id.* at 603), the confession is admissible. See also *Taylor* v. *Alabama*, 457 U.S. 687 (1982); *Dunaway* v. *New York*, 442 U.S. 200 (1979).

The court of appeals simply applied the reasoning of these two cases. Following *Schneckloth*, the court held that, "[u]nder the Fourth Amendment, evidence obtained pursuant to [a] defendant's consent is admissible only if defendant's grant of consent is voluntary under the totality of the circumstances" (Pet. App. A13). Following *Brown*, the court held that the voluntariness of a confession following a Fourth Amendment violation turns on factors "such as the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and

flagrancy of the official misconduct" (*id.* at A17, citing *Brown* v. *Illinois*, 422 U.S. at 603-604). Putting the two cases together, the court concluded that analysis of the *Brown* factors is necessary to ensure that evidence derived from a consent search is sufficiently independent of a prior Fourth Amendment violation (*id.* at A17, A19, A33). This approach is consistent with the approach taken by other courts of appeals. See, *e.g.*, *United States* v. *Wellins*, 654 F.2d 550, 554-556 (9th Cir. 1981); *United States* v. *Sanchez-Jaramillo*, 637 F.2d 1094, 1099-1100 (7th Cir.), cert.denied, 449 U.S. 862 (1980); *United States* v. *Mullens*, 536 F.2d 997, 1000-1001 (2d Cir. 1976); *United States* v. *Race*, 529 F.2d 12, 14-15 (1st Cir. 1976); *United States* v. *Bazinet*, 462 F.2d 982, 989 (8th Cir.), cert. denied, 409 U.S. 1010 (1972).

2. Petitioner contends that the decision below conflicts with the decision of the Fifth Circuit in *United States* v. *Melendez-Gonzalez*, 727 F.2d 407 (1984). Although the court below also perceived that its decision was in conflict with that of the Fifth Circuit, we believe that both petitioner and the Tenth Circuit have overstated the degree to which the two circuits disagree.

In *Melendez-Gonzalez*, border patrol agents illegally stopped the defendant's car on a highway. They then unlawfully searched the car's trunk, where they found a large burlap sack that smelled of marijuana. The agents then took the defendant and his car into custody. Pursuant to a consent form that the defendant signed at the police station, the agents again searched the car's trunk and found 21 pounds of marijuana, which became the basis for the prosecution.

The Fifth Circuit held that the evidence seized during the consent search was improperly admitted at trial. While it did not "dispute the fact that defendant actually signed the consent form, or even that he did so voluntarily" (727 F.2d

at 413), the court held that the evidence still had to be excluded, because "for all practical purposes, the search was conducted on the highway, [and] the consent form which defendant signed at the station simply came too late." (*id.* at 414). Though superficially similar, *Melendez-Gonzalez* is in fact distinguishable from the decision below, on three important grounds.

To begin with, the order of the seizures and consents in the two cases differs significantly. In *Melendez-Gonzalez*, the agents actually seized the evidence in question before they obtained the defendant's consent to search. The agents completed an unlawful seizure and then belatedly sought the defendant's consent as a means of rescuing their otherwise unlawful seizure. In this case, by contrast, Officer Branick did not seize the doves in petitioner's pail; he merely saw them when he looked into the pail. He left the doves where he saw them, and only later sought petitioner's consent to conduct a search. In the interim, the doves remained in petitioner's possession. Officer Branick thus was not seeking petitioner's consent in order to justify a prior illegal *seizure*. Had he been doing so, the court below—like the Fifth Circuit in *Melendez-Gonzalez*—would have held the doves to be inadmissible. See Pet. App. A28 n.2 ("evidence [seized] pursuant to an illegal search * * * is inadmissible * * * regardless of defendant's subsequent consent to search").

Second, the time that elapsed and the events that occurred between the initial searches and the subsequent consents in the two cases are substantially different. In *Melendez-Gonzalez*, the officers kept the defendant in their custody continuously from the time they initially searched his car trunk until the time he consented to their renewed search. The time that elapsed between arrest and consent was short, and there were no intervening circumstances that might have purged the taint of the agents' illegal course of

conduct. It is not surprising that, under these circumstances, the Fifth Circuit found the defendant's consent to be insufficient to validate the second search of his car. In this case, by contrast, petitioner was never in police custody; he was not pressured to consent to the search; and he was not even aware of the earlier search of his pail, so his consent could not have been the product of a belief on his part that resisting the police effort to search his truck would be futile. In short, petitioner's consent to the search was wholly independent of the illegal search. Thus, this case, unlike *Melendez-Gonzalez*, is similar to cases in which, in spite of a "but for" causal relationship between illegal conduct and seized evidence, this Court has held that the effect of a prior illegal search was dissipated by subsequent acts of free will. See, *e.g.*, *United States* v. *Crews*, 445 U.S. 463 (1980) (victim's in-court identification); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (witness's decision to testify against defendant).

Finally, the flagrancy of the Fourth Amendment violations in the two cases is vastly different. In *Melendez-Gonzalez*, the police stopped and detained the defendant for an extended period without reasonable suspicion, and unlawfully searched his car on the highway without probable cause or consent. The intrusions were substantial. In this case, by contrast, Office Branick simply lifted a vest that covered petitioner's pail and looked at the pail's contents. While Officer Branick's actions may have constituted an illegal search,[1] the Fourth Amendment violation was certainly not flagrant. Under *Brown* v. *Illinois*, *supra*, the

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[1]Whether Officer Branick's conduct actually constituted a "search" is a much closer question than is apparent from the decisions of the courts below. Petitioner could only have had a quite limited expectation of privacy in an open pail carried on a hunting trip, and Officer Branick's intrusion on that expectation was, at most, minimal. See *New York* v. *Class*, No. 84-1181 (Feb. 25, 1986); *Cardwell* v. *Lewis*, 417 U.S. 583, 591-592 (1974) (plurality opinion).

"flagrancy of the official misconduct" is an important factor bearing on whether the taint of a prior Fourth Amendment violation is overcome by intervening circumstances. For that reason as well, this case is distinguishable from *Melendez-Gonzalez*.

That the decisions of the Fifth and Tenth Circuits do not conflict is further evidenced by the fact that, in a case quite similar to this one (and quite different from *Melendez-Gonzalez*), the Fifth Circuit held that a defendant's voluntary consent is an act sufficient to break the causal connection between an illegal search and a subsequent seizure of evidence derived from that prior search. In that case, *United States* v. *Fike*, 449 F.2d 191 (1971), the police conducted an arguably illegal search of an automobile when the defendant was not present. The search disclosed incriminating evidence. When the defendant returned, the police sought and obtained his consent to search the car. In that setting, the Fifth Circuit held that the fruits of the consent search did not have to be suppressed, even though the arguably unlawful first search was a "but for" cause of the later consent search. The first search, although illegal, was not flagrant, and there were significant "intervening circumstances" ensuring the voluntariness of the defendant's consent. That, of course, is precisely the reasoning applied by the court below.

Other cases from the Fifth and Tenth Circuits confirm that the two circuits do not approach consent searches following Fourth Amendment violations in fundamentally different ways. The Fifth Circuit states that, "in addition to proving voluntariness, the government must show [that there is] a sufficient break in events to undermine the inference that the consent search was caused by the fourth amendment violation" (*United States* v. *Cherry*, 759 F.2d 1196, 1210-1211 (1985)). The Tenth Circuit states the government need only show "that defendant's consent is

free of police coercion and is voluntary *in fact*" (Pet. App. A16 (emphasis in original)). The difference is purely one of form, not substance. The Fifth Circuit determines "voluntariness" without inquiring into the *Brown* v. *Illinois* factors; it considers those factors separately in determining whether "a sufficient break in events" has occurred. See *United States* v. *Cherry*, 759 F.2d at 1210-1212; *United States* v. *Wilson*, 569 F.2d 392, 395-397 (1978). The Tenth Circuit, by contrast, requires that the voluntariness inquiry itself take into account the *Brown* v. *Illinois* factors. See Pet. App. A15-A19; see also *United States* v. *Recalde*, 761 F.2d 1448, 1457-1459 (10th Cir. 1985). Labels aside, it is clear that the two circuits require identical proof in order to purge the taint of a prior Fourth Amendment violation from a subsequent consent search. Compare *United States* v. *Cherry*, 759 F.2d at 1210-1211, with *United States* v. *Recalde*, 761 F.2d at 1457-1459. Accordingly, any conflict between the Fifth and Tenth Circuits is at most perceived, and this Court's intervention is not necessary.[2]

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[2]In concurrence, Judge Logan suggested that the court below would reach a different result than would other courts in a case where the defendant is unaware of the prior illegal search. Pet. App. A35. In fact, the majority below does not appear to have adopted any such rule. See *id.* at A27 & n.1 (had "the officers used information obtained in the prior illegal search [of which petitioner did not know] to coerce [petitioner] into consenting to the subsequent search," the doves would not be admissible); *id.* at A32 ("We agree that there may be certain situations in which Government officials, using illegally obtained information, might coerce or cajole the defendant into consenting to a search [and that, u]nder such circumstances the consent would be involuntary, the search illegal, and the evidence seized thereby rendered inadmissible"). However, even if Judge Logan is correct, his speculation as to what the majority would do in a case involving coercive conduct on the part of the police has no bearing on the outcome of this case, or on the presence of a conflict among the circuits on facts such as those presented here. As Judge Logan noted, the police conduct in this case was not flagrant (see *id.* at A36); there was not a "hint of coercion" (*ibid.*). Thus, even under Judge Logan's interpretation of the majority's rationale, there is no conflict between the circuits on the facts presented here.

3. Petitioner also alleges that the court of appeals' decision conflicts with decisions of the First, Third, and Sixth Circuits. Pet. 10-14. But the cases on which petitioner relies involve attempts by the government to secure search warrants with evidence obtained in violation of the Fourth Amendment. See *United States* v. *Bailey*, 628 F.2d 938, 946 (6th Cir. 1980); *McGinnis* v. *United States*, 227 F.2d 598, 603 (1st Cir. 1955); *Fraternal Order of Eagles No. 778* v. *United States*, 57 F.2d 93, 94 (3d Cir. 1932).[3] The court below expressly rejected the idea that "law enforcement officers [could] * * * rely upon illegally obtained evidence to obtain valid search warrants or to obtain legally sufficient probable cause for searches and seizures * * *" (Pet. App. A33). Thus, the decision below plainly does not conflict with the decisions of those circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]We note that the conduct found illegal in *Fraternal Order of Eagles, No. 778* v. *United States*, 57 F.2d 93 (3d Cir. 1932), has since been found legal by this Court. See *Lewis* v. *United States*, 385 U.S. 206 (1966).